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ABSTRACT

This study of the civil rights policies and practices of the Bush Administration reviews the first 2 years of that administration's actions, presents recommendations for the future, and offers a series of working papers prepared by experts in the civil rights field. Part 1 of two major parts presents the actual report of the Citizen's Commission on Civil Rights, a bipartisan group of former officials of the Federal Government. That report treats civil rights policy and enforcement in the Bush Administration and offers seven recommendations for change. Part 2 presents 22 working papers on civil rights that deal with the following topics: (1) the Civil Rights Act of 1990; (2) education (enforcement in elementary and secondary education, sex discrimination, and minority access to higher education); (3) employment rights (equal employment opportunity and employment rights of older Americans); (4) immigration; (5) health (civil rights impact on national health policies and challenges posed by the Acquired Immune Deficiency Syndrome); (6) housing (fair housing enforcement, federal fair lending, credit opportunity, and community reinvestment enforcement); (7) affirmative action; (8) political rights (voting rights enforcement, voter registration reform, and the 1990 Census and minority undercount); (9) rights of institutionalized persons; (10) rights of persons with disabilities (Americans With Disabilities Act, Department of Housing and Urban Development, and rights of the institutionalized disabled); (11) United States Civil Rights Commission; and (12) administration of justice (judicial nominations and the Hate Crime Statistics Act). Included are notes on the authors and extensive endnotes for the working papers. (JB)

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LOST

OPPORTUNITIES

THE
CIVIL RIGHTS RECORD OF
THE BUSH ADMINISTRATION MID-TERM

Citizens' Commission on Civil Rights

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Lost Opportunities:

The Civil Rights Record of the Bush Administration Mid-Term

Edited by
Susan M. Liss and William L. Taylor

Report of the Citizens' Commission on Civil Rights

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Dedication

The Commission dedicates this report to the Honorable William J. Brennan, Jr. who retired as Associate Justice of the United States Supreme Court during the preparation of this report. His remarkable career on the Supreme Court reflects a deep and abiding commitment to the principle of equal justice for all. All who work for equal justice are in his debt.

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Many people contributed to the creation of this report. Susan M. Liss, Director and Counsel, worked closely with the authors of the working papers and wrote the Commission's report. William L. Taylor, vice chair of the Commission, helped edit the report and provided overall guidance for the project.

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FOREWORD

The Citizens' Commission on Civil Rights is a bipartisan group of former officials who have served in the federal government in positions with responsibility for equal opportunity. It was established in 1982 to monitor the civil rights policies and practices of the federal government and to seek ways to accelerate progress in the area of civil rights.

This study consists of two parts. Part One (chapters I and II) is the Report of the Commission, reviewing the civil rights record of the Bush administration after two years in office. Part One concludes with the Commission's Recommendations (chapter III). Part Two (beginning with chapter IV) is a series of working papers prepared by leading civil rights and public interest experts, with some contributions by private practitioners. Several of these authors also contributed to the Commission's 1989 study, *One Nation, Indivisible: The Civil Rights Challenge for the 1990s.*

The Commission gratefully acknowledges the support of the Ford Foundation and the Rockefeller Foundation for this study.

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PART ONE

Report of the Citizens' Commission on Civil Rights

Chapter I
Introduction

In January 1989, the Citizens' Commission on Civil Rights issued a comprehensive report, surveying the damage that had occurred in civil rights during the 1980s. The Commission found that by most objective measures, the drive toward equality of opportunity had faltered and that indeed there had been regression. Most disturbing, we found that a political climate had been created in which the rights and aspirations of one group of citizens were pitted against those of others resulting in an escalation of racial tensions. Accordingly, the Commission concluded that "A first priority for the new administration should be to take visible and sustained initiatives to deal effectively with the evident rise in intergroup tension and conflict."

To implement this priority, the Commission set forth in *One Nation, Indivisible: The Civil Rights Challenge for the 1990s*, a series of recommendations for executive and legislative action, stating that, "President Bush has a genuine opportunity to reaffirm the national commitment to civil rights, to make a fresh start, and to set the nation on a course toward civil rights progress and reconciliation."

After two years, it seems clear that dealing effectively with intergroup tensions has not been a first priority for the Executive branch or for the nation and that opportunities to set the nation on a course toward progress and reconciliation have been lost. As a result, there has been a continuing deterioration in intergroup relations, deterioration which threatens the strength and unity of the nation and which must be reversed.

To be sure, the picture of federal action over the past two years is a more variegated one than in the 1980s, and there have been positive actions that may contribute to a reduction of tensions and to civil rights progress. Prime among these was enactment of the Americans with Disabilities Act in 1990, a pathbreaking law which extends the guarantees of equal opportunity in every important area to people with disabilities and which reflects credit both on the President and the Congress. In addition, President Bush has spoken forcefully about equality and opportunity and has backed his statements with several appointments to the Cabinet and subcabinet of highly qualified women and minorities.

Moreover, in selected areas of civil rights, enforcement has improved. This appears to be particularly true of the Administration's enforcement of the Voting Rights Act and its initial enforcement efforts under the Fair Housing Act Amendments Act, which became law in 1989. In housing and a few other areas, the Administration and Congress have secured modest increases in the resources available to assist low income citizens, resources which are an indispensable prerequisite to equal opportunity.

But in most areas of civil rights policy and enforcement, the Administration has continued the policies of the Reagan years that constricted opportunities and curtailed remedies. Most damaging of all was the injection of the false claim of "quotas" into the debate over the Civil Rights Act of 1990 — a bill to restore equal employment remedies that had been curtailed by Supreme Court decisions. Regrettably, President Bush, acting on the advice of his legal and political counselors, embraced the "quota" charge in vetoing the bill, an act of divisiveness that was repeated by others in the 1990 election campaign and that has escalated racial tensions in the nation.

Moreover, whatever positive changes may occur at the margins, evidence continues to mount of the social costs of racism and inequality of opportunity. As this report documents, a major segment of the nation's minority population continues to suffer the legacy of years of oppression and discrimination; it remains racially isolated, cut off from equal opportunities for education, jobs, and services, and afflicted by the most serious kinds of health and social problems. At the same time, hundreds of thousands of newer immigrants from Central and South America, from Southeast Asia and elsewhere have needs and entitlements to equal opportunity in public schools and in the workplace, opportunities that often are not available. So, too, are opportunities being denied in practice to disabled people whose rights to equal opportunity have only recently been legally acknowledged.

As the problems of continuing discrimination and deprivation go unattended, intergroup tensions and conflict have risen — a problem exemplified most discouragingly by instances of racism that have occurred on some of the nation's most prestigous college campuses. But the campuses are not the only arena where intergroup tensions continue to mount. From Bensonhurst to Boston to California, incidents of racial conflict occur in increasing numbers. And racial stereotypes of blacks and Hispanics persist despite a growing number of white people who claim to support racial equality.[1]

In the face of these escalating problems, much of the energy of the Bush Administration continues to be expended in abstract and sterile debates about the need for "color blind" remedies, a debate which must strike minority citizens who know that white America is only too aware of the color of their skin as a cruel irony — a debate which heightens rather than lessens racial tensions. While legitimate issues exist about the scope of remedies for discrimination, the actions of the Administration continue to be shaped less by principle than by calculation of the political advantage to be derived from using the "quota" label.

Like the Bush Administration, the nation itself is divided and ambivalent on civil rights issues. Many white Americans profess a belief in equality and fairness but remain reluctant to take the difficult steps that are necessary to make opportunities in education, housing, and employment meaningful to those who have been denied it. The Commission continues to believe that this is a problem that can only be addressed through leadership at the nation's highest levels — leadership that will call for sacrifices in order to achieve the goal of equal opportunity, and that will forego the use of code words that may achieve short-term political advantage but add fuel to the flames of racial tensions.

Accordingly, this report renews the Commission's call to the President to take the lead in efforts to reduce intergroup tensions and recommends action that the Executive and Legislative branches should take to frame positive civil rights policies and assure strong enforcement.

Chapter II

Civil Rights Policy and Enforcement in the Bush Administration

I. Introduction

During the 1980s, the Reagan Administration attempted to radically alter the quarter-century old bipartisan national commitment to a strong and effective civil rights policy. President Reagan, Attorney General Edwin Meese, Assistant Attorney General William Bradford Reynolds, and others engaged in a campaign to repeal fundamental policies providing for broad coverage of civil rights laws, and sought to reduce the federal government's role in enforcing laws designed to eradicate discrimination and prejudice. The Administration denounced civil rights policies which provided affirmative remedies or relief that were race- or gender-conscious as violating principles of "color-blindness" in the Constitution.

In its 1989 report, *One Nation, Indivisible: The Civil Rights Challenge for the 1990s,* the Commission reviewed the Reagan Administration record, and set forth an agenda for change for the 1990s. The Commission stated, "reaffirming a commitment to equality of opportunity, reinstating effective enforcement programs, and restoring public confidence in government's adherence to the rule of law are the challenges facing a new administration in the 1990s."

Early signs from President Bush were encouraging. Even before his inauguration, President Bush spoke of the need to overcome the "moral stain of segregation."[2] But even early on, his actions did not match his rhetoric. At the same time that he named highly qualified women and minorities to serve in his Cabinet and in other high ranking positions,[3] the President's first nominee to the most important civil rights position in the federal government — the assistant attorney general for civil rights — lacked even minimal qualifications for the job.

There have been some modest increases in enforcement in selected areas of civil rights law, particularly voting rights and housing. And yet the Administration appears to be continuing many of the same policies as its predecessor, particularly its insistence that civil rights policy must be "color blind." The insistence on a "color blind" standard for civil rights rests on the notion that America no longer has a national obligation to act affirmatively in order to overcome the legacy of slavery and government-sanctioned segregation that existed until well into the 1960s. Such a theory ignores the well-documented realities of continuing discrimination[4] and its effects.

For the Bush Administration, insistence on "color blindness" and "race neutrality" has resulted in continuing hostility to any measures — either in legislative proposals or litigation — that incorporate race- or gender-conscious remedies or require affirmative relief.

The uproar concerning minority scholarship awards at public and private colleges and universities is one well-publicized example of the Administration's efforts to impose a "colorblind" standard on civil rights policy. Although newly-appointed Education Secretary Lamar Alexander has indicated that the Administration is likely to resume a policy of sanctioning minority scholarships, the controversy over minority scholarships is likely to cause continuing damage for it raises questions about the fairness of the federal commitment to help minorities gain access to higher education. Whether or not the Administration ultimately adopts a policy that permits colleges and universities to continue to provide minority scholarships, the fact remains that unless it repudiates the steps taken by a high-ranking official of the Department of Education by launching a vigorous affirmative action program on behalf of minority scholarships, the movement for increased access by minorities to higher education will have been seriously eroded.

It is the President's veto of the Civil Rights Act of 1990 which provides the most compelling evidence of the Administration's lack of commitment to fundamental principles of equal opportunity. Drafted in response to several 1989 Supreme Court decisions which severely limited the rights of victims of employment discrimination, the Civil Rights Act of 1990 had broad bipartisan support in both the Senate and the House of Representatives. However, rather than working with congressional leaders and civil rights advocates to reverse the Court decisions, the Administration sought to use the Civil Rights Act to partisan, political advantage, inaccurately and misleadingly claiming that the bill would require hiring "quotas." In vetoing the bill, President Bush not only disappointed those who had looked to him to chart a course of new moral leadership in domestic policy, but also fanned the flames of racial intolerance and division.

At the mid-point of the Administration, America has a long distance to travel in order to overcome the "moral stain of segregation." White resentment toward minorities and women — the resentment that is aroused by an irresponsible use of the "quota" issue — may provide partisan advantage for the Republican party, but it will only serve to undermine the effort to achieve a unified nation. The face of the country is changing. By the turn of the century, more than three-fourths of new entrants to the workforce will be either female or minority. In an ever-tightening world economy, standing still on the issue of equal opportunity may well mean losing ground. The result could be serious economic trouble for the United States. The Commission calls on the President to reject the politics of racial divisiveness and instead work to heal our racial tensions as we look toward the challenges of the next century.

II. Continuing Effects of the Legacy of Discrimination

The nightly news and the daily newspapers tell the story of why America needs to renew its national commitment to address the continuing effects of the legacy of discrimination. Drugs, crime, high rates of teen pregnancy can all be traced in one way or another to the lack of opportunity for the poor, and particularly the minority poor.

While poverty cuts across color lines, the statistics demonstrate that the minority poor, and in particular, the children of the minority poor, suffer the most economic disadvantage.

A. AMERICA'S CHILDREN

A recent study conducted by the Center for the Study of Social Policy reports that today our nation's children are at greater risk than at the beginning of the 1980s. In the last ten years there has been a marked increase in child poverty: in forty-one states and the District of Columbia more children have fallen into poverty. In nine states, the proportion of children in poverty increased by more than 50 percent.[5]

By the end of the 1980s, more than 12 million children, or 20.1 percent, were growing up in poverty. Black children were the worst off: 43.8 percent lived below the poverty line. Hispanics were only slightly better off, with 38.2 percent living in poverty.[6]

Poverty's effect on America's next generation is overwhelmingly negative. Significantly more children who live in poverty are born at a low birth weight, making them far more vulnerable to disease and death, and that figure has increased in the last ten years. While the infant mortality and child death rates have improved in the last decade, the current rate is unacceptably high, and in some jurisdictions, such as the District of Columbia, the rate is higher than that of many underdeveloped countries. Among blacks and Hispanics, nearly 40 percent of all children are born to mothers who have had no prenatal care.[7]

More than 25 percent of black children, and nearly 35 percent of Hispanic children, are not covered by health insurance. This lack of insurance imperils the health of these children and threatens the health of the nation. Studies show that uninsured children are approximately 20 percent more likely to be reported in poor health and are less likely to be immunized than those with insurance. One in three poor children is not immunized at age two against rubella, measles, and mumps.[8]

Poverty affects older children in other ways. The rate of teenagers who die as a result of violence, bred by drugs and the availability of weapons, has soared in the last decade. Black teenagers have suffered the most. While violent deaths among whites increased by 6 percent in the period from 1984 to 1988, violent deaths among blacks rose by 51 percent.[9]

While the rate of births to teenagers who are not married fell for blacks, it rose dramatically for whites and Hispanics during the 1980s. Nevertheless, a black teenager is almost four times as likely as a white teenager to have a baby out of wedlock.[10] Children born outside of marriage who grow up with single mothers are likely to be poor for most or all of their childhood.[11]

B. EDUCATION

America's school systems are failing to meet the profound needs of many of our students — not only academic, but also social, emotional, and practical. Every day in this country, 1,512 teenagers drop out of school,[12] and many of them will not find work at jobs that will lift them out of poverty. Among black non-student youths ages 16 to 24, the unemployment rate has grown persistently, and by the end of the 1980s, 37.4 percent of black high school dropouts were unemployed.[13]

Federal programs that have been established to help economically and educationally disadvantaged students — even those found to be highly successful — still are not adequately serving students' needs. Even with increases provided for in the FY 1991 budget agreement, Head Start preschool programs for low-income children and their families will serve only about 450,000 three-, four-, and five-year-olds — less than 20 percent of the 2.5 million eligible children. This year, Chapter 1 (Compensatory Education) reading and math programs for disadvantaged students will serve about 6 million children — only half of the elementary and secondary students living in poverty.[14]

C. EMPLOYMENT

The gap in wages between whites and blacks has not improved in the last decade; data shows that if present policies continue, we probably should expect no mitigation before the end of the century. Women continue to earn only 66 percent of men's annual pay. Black men make only 74.8 percent of the earnings of white men; Hispanic men earn 65.5 percent. Black and Hispanic women are doubly disadvantaged, as black women receive only 60.7 percent of white men's earnings; Hispanic women earn only 54.5 percent of white men's salaries.[15] In the next decade, five out of every eight new entrants into the labor force will be women; blacks and Hispanics will make up 29 percent of the net addition to the labor force by the year 2000.[16]

D. HOUSING

The most recent survey of public housing programs by the Department of Housing and Urban Development shows that blacks, Hispanics and other minorities comprise 49 percent of all recipients of subsidized rental housing. Public housing statistics are more stark: Blacks are by far the largest racial group living in public housing: 47 percent of all units are occupied by blacks, 39 percent are white-occupied, and Hispanics and other minorities make up the remaining 14 percent.[17] At the same time, the opportunities for blacks to own their own homes are shrinking. Moreover, the number of homeless families is growing, and minorities make up a disproportionate number of this group.[18]

E. INCARCERATION

Today, nearly 700,000 men and women are incarcerated in state and federal prisons, more than 45 percent of them blacks.[19] At any time, one-fourth of American black men are behind bars or on probation. A recent Rand Corporation study predicts that 16 percent of all black males in Washington, D. C. will be arrested and charged with selling drugs before the age of 21.[20] Moreover, nearly half of the 2,393 inmates waiting on death row are black. Since 1976, when capital punishment was reinstated by the Supreme Court, 40 percent of all defendants put to death have been black.[21]

In February 1990, the General Accounting Office found "a pattern of evidence indicating racial disparity in the charging, sentencing, and imposition of the death sentence." Even though blacks and whites are victims of homicide in roughly equal numbers, over 84 percent of those executed since 1976 were convicted of killing whites. In that same period, no whites have been executed for killing blacks.

This evidence suggests a pattern of inequity. To address the problem of racial discrimination in capital sentencing, the Racial Justice Act was introduced in both the House and the Senate in the 101st Congress. After hearings in both the House and Senate Judiciary Committees, both committees added the Racial Justice Act to pending legislation that would expand the death penalty on the federal level. This legislation was then incorporated into the Omnibus Crime legislation that was considered first by the Senate and then by the House. The Senate, under pressure from the Administration and others, voted to remove the Racial Justice Act from the Omnibus Crime package. The House, however, voted to support the Racial Justice Act and retain it as part of its package. In the end, all provisions relating to the death penalty, including the Racial Justice Act, were removed from the crime package that the President signed on November 29, 1990.

Proponents of the Racial Justice Act expect it to be reintroduced in the 102nd Congress in order to provide basic civil rights protections in our nation's system of capital punishment. Current patterns of sentencing, which indicate that those convicted of murdering whites are more frequently sentenced to death than those convicted of murdering blacks, mirror sentencing patterns that were mandated by law and practice before the adoption of the Thirteenth and Fourteenth Amendments.

Other remedial federal legislation has been necessary to remove vestiges of other forms of once-lawful discrimination; the Racial Justice Act is designed to achieve the same result.

F. HEALTH

In November, the National Center for Health Statistics reported that life expectancy for black people has dropped substantially, continuing a four-year decline. Blacks' life expectancy fell to 69.2 years in 1988; for whites, the rate was 75.6, unchanged from the previous year.[22] Cancer death rates for blacks and other minorities are increasing much faster than those for white Americans, sometimes as much as 20 to 100 percent more.[23] Blacks and other minorities also suffer higher rates of hypertension and other serious illnesses than whites, partly due to the lack of health care.

These appalling inequities demonstrate that victims of the legacy of discrimination continue to be denied access to opportunity. Although many programs exist to address these problems, the facts provide clear evidence that large portions of our at-risk citizens are not served by programs designed to meet their needs and provide them with opportunities. This is due in part because funding for these programs fails to keep pace with need.

Clearly the problems revealed by these disparities cannot be addressed by anti-discrimination laws alone but require a broad range of action at all levels of society. But civil rights laws can play an important role in providing opportunity and redressing inequity, and, the Administration's civil rights policy for the most part has failed to address these problems.

Racial tensions feed on the despair that dominates the lives of a large percentage of the persons who are victims of these inequalities and disparities. To be sure, in comparison to the bleak record of the Reagan Administration, there have been modest gains in the first two years of the Bush presidency. But these gains do not constitute a major drive to eliminate these disparities. Until such a drive is launched, despair will not be replaced with hope, and racial tensions will become increasingly serious.

III. Early Rhetoric and Appointments

President Bush's inaugural speech appeared to augur a new day for tolerance and equal opportunity and offered hope that he would address the critical problems of inequality of opportunity. His early actions also presented hopeful signs. After eight years, he has opened the doors of the White House to civil rights leaders, members of the Congressional Black Caucus, and the Congressional Hispanic Caucus. In an address to the National Urban League in August, 1989, President Bush pledged, "My Administration is committed to reaching out to minorities, to striking down barriers to free and open access. We will not tolerate discrimination, bigotry, or bias of any kind, period."[24] At a Rose Garden ceremony commemorating the 25th anniversary of the 1964 Civil Rights Act, President Bush promised "vigilant and aggressive enforcement" of existing civil rights laws.[25]

A. EXECUTIVE BRANCH APPOINTMENTS

The President has also appointed a number of highly qualified women and minorities to key positions within his Administration. For example, Health and Human Services Secretary Dr. Louis Sullivan has engaged in several highly visible efforts to draw public attention to the health gap that exists for minorities.[26] U.S. Civil Rights Commission Chairman Arthur Fletcher has worked to revitalize that moribund agency.[27] Along with Fletcher and Sullivan, Constance Newman, head of the Office of Personnel Management, apparently played an important role in arguing against the President's veto of the Civil Rights Act of 1990. At the Labor Department, both Secretary Elizabeth Dole (who left the Administration at the end of its second year) and the head of the Office of Federal Contract Compliance Cari Dominquez appear eager to address the important issue of the "glass ceiling" which may operate to prevent women and minorities from entering high-level management positions.[28]

B. JUDICIAL APPOINTMENTS

The President's judicial appointments, however, have been disappointing. The Bush Administration appears to be continuing the judicial selection policies of President Reagan, and the federal judiciary continues to move away from its traditional role in our tripartite system of democracy as the ultimate protector of the rights of those least powerful citizens in the nation. At both the Supreme Court and in the lower federal trial and appeals courts, the federal judiciary appears increasingly hostile toward civil rights advocates.[29]

Moreover, despite increases in the number of women and minorities whose qualifications should make them candidates for federal judgeships, the Administration's selections have been overwhelmingly white, conservative, wealthy, and male.[30] After two years, President Bush has filled 70 vacancies on the federal bench; of those nominated, eight were women, three were black, and two were Hispanic. This failure to appoint qualified women and minorities will keep the federal judiciary from achieving the diversity that marks our society, and may well undermine Americans' faith in the fairness of the federal courts.[31]

C. ASSISTANT ATTORNEY GENERAL FOR CIVIL RIGHTS

The appointees to the most important civil rights enforcement post — that of Assistant Attorney General for Civil Rights — seem to reflect the Administration's ambivalence about civil rights. The Assistant Attorney General for Civil Rights at the Justice Department is the chief federal civil rights law enforcement officer. In the Reagan years, Assistant Attorney General for Civil Rights William Bradford Reynolds was the focus of harsh criticism for his strenuous opposition to affirmative action and remedies for school segregation, and for zealous pursuit of his conservative policy agenda. In the Bush Administration, the Assistant Attorney General for Civil Rights is alone among the Assistant Attorneys General for criminal, anti-trust, tax, civil, and natural resource law as a novice in the field.

President Bush's first nominee for the post was rejected by the Senate for lacking both legal experience and substantive knowledge. In fact, the early April 1989 nomination of William Lucas to the critical Assistant Attorney General post shocked the civil rights community, coming at the time of the early rhetoric about vigorous civil rights law enforcement. Lucas, a black Democrat-turned-Republican, was a former FBI agent, sheriff, and county executive in Detroit, Michigan. His legal experience was limited to less than two years of part-time practice as a private attorney in Detroit. If confirmed, Lucas would have been the first Assistant Attorney General for Civil Rights without substantial legal experience.

William Lucas was ultimately unable to allay the many doubts about his qualifications in numerous personal meetings with Senators and in his confirmation hearings.[32] Lucas's nomination was defeated by the Senate Judiciary Committee in a 7-7 tie vote in late July, 1989. In a second tie, the Committee refused to send his name to the full Senate, effectively killing the nomination.

The Bush Administration waited almost six months after the rejection of William Lucas, before announcing the nomination of John R. Dunne, a New York lawyer and former State Senator, for the Assistant Attorney General job. Dunne, an accomplished insurance attorney and legislator, possessed the technical legal qualifications lacked by Lucas, although Dunne, like Lucas, had virtually no background in civil rights. Moreover, as a leader in the New York Legislature, Dunne had vigorously opposed desegregation efforts in the state's schools, including not only mandatory busing but redistricting and desegregative siting of new schools. Dunne also held long-standing membership in two private clubs that excluded women. Though praised for his support of the Equal

Rights Amendment, for helping to mediate the Attica prison riots in 1971, and for forging a progressive compromise on AIDS policy in 1988, Dunne acknowledged he had "not been a civil rights leader or one of the visible advocates."

John Dunne's confirmation was all but assured when he received support from New York's Democratic Governor Mario Cuomo, Senator Daniel Patrick Moynihan, and the overwhelmingly Democratic delegation in the House of Representatives, including prominent black Representative Charles B. Rangel of Manhattan. The question of why the nominee for Assistant Attorney General for Civil Rights was exempted from the subject-area experience standard met by his peers at the assistant attorney general level in the Justice Department went unanswered in a two-hour confirmation hearing on March 7, 1990. The nomination was approved by voice votes in the Judiciary Committee on March 8th and in the full Senate on March 9th.

During his tenure as head of the Civil Rights division, Dunne has attempted to reach out to the civil rights community and repair the damage done by his predecessor.[33] He has pledged more vigorous enforcement efforts, and he has personally argued several voting rights cases which seek to gain broader coverage under the Voting Rights Act. However, Dunne also played a visible public and private role in defending the Administration's veto of the Civil Rights Act of 1990 and arguing the position that it was a "quota" bill. Whether Dunne's efforts to establish good relations with the civil rights community will withstand the bitter aftermath of the President's veto is unclear.

IV. The Veto of the Civil Rights Act of 1990

The proposed Civil Rights Act of 1990 provided the first major test of the civil rights policies of the Bush Administration. The Act was designed to reverse the serious damage done to federal civil rights laws by a series of 1989 Supreme Court decisions and to strengthen civil rights remedies. Despite significant bipartisan backing and repeated efforts to obtain Administration support, however, the Act was opposed and ultimately vetoed by President Bush, making him only the third President in United States history — following Andrew Johnson and Ronald Reagan — to veto civil rights legislation. The Administration's rhetoric in opposing the bill, moreover, not only mischaracterized the legislation, but has also fanned the flames of racial intolerance and division. In short, the Bush Administration has failed its first critical test on civil rights.

The genesis of the Civil Rights Act of 1990 was a series of closely divided Supreme Court decisions which dramatically cut back the scope and effectiveness of civil rights protections, particularly with respect to job discrimination. These rulings included *Patterson v. McLean Credit*, 109 S. Ct. 2304 (1989) which restricted the scope of a broad Reconstruction-era civil rights statute, 42 U.S.C.§ 1981, that prohibits intentional race discrimination. The Court held that the statute only applied to the making of an employment and other contracts, and did not apply to discrimination occurring after the formation of the contract. Thus, the decision permits even blatant discrimination on the job.

Wards Cove Packing Co. v. Atonio, 109 S. Ct. 2115 (1989), effectively reversed the Court's landmark 1971 *Griggs* decision which held unanimously that employers could be liable under the 1964 Civil Rights Act if their policies produced a disparate impact on women or minorities seeking employment or promotion and were not justified by "business necessity." In *Wards Cove*, the Court loosened the definition of business necessity and increased the legal hurdles facing employees challenging job practices that have systemic discriminatory impact.

In *Martin v. Wilks*, 109 S. Ct. 2180 (1989), the Court reversed prior doctrine and made settlement agreements in discrimination cases more vulnerable to attack by third parties. In the case of *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), the Court ruled that employment decisions motivated in part by intentional bias do not violate the law at all if the employer can show that the same decision would have been made in the absence of discrimination. In *Lorance v. A.T.T. Technologies, Inc.*, 109 S. Ct. 2261 (1989), the Court severely limited the time within which discrimination victims must file legal challenges, ruling that the time period during which an employee may challenge a discriminatory seniority system begins to run from the date of the system's adoption, rather than the date that an employee actually suffers its discriminatory effects.

The 1990 Act was designed to restore the civil rights protections which were severely limited by the Court's decisions. In addition, the Act sought to strengthen civil rights remedies, primarily by providing that all victims of intentional discrimination could sue for damages, as well as for equitable remedies in cases of intentional discrimination. Currently, such relief is available only to those claiming intentional race discrimination under 42 U.S.C. § 1981. Victims of sex discrimination, for example, cannot obtain damages even if the wrong is egregious and the harm severe.

The Bush Administration's response to the Court's decisions and to the Act was extremely disturbing. Initially, Administration officials claimed that the decisions were simply "technical" in nature and did not warrant any legislative action. After the Act was introduced, the Administration agreed that the *Patterson* and *Lorance* decisions should be corrected and proposed legislation to that end. At the same time, the Administration continued to oppose key sections of the Act, even denying in testimony that any harm or change in the law had resulted from the *Wards Cove*, *Wilks*, or *Price Waterhouse* decisions.

Over the course of consideration of the legislation, the Administration proposed several versions of its own legislation. Some of these proposed measures would have worsened the problem. For example, one proposal would have permitted employers to defend discriminatory job practices on the basis of "legitimate community or customer relations." This proposal was immediately denounced by civil rights leaders, noting that such a "customer relations" defense could permit airlines to ban male flight attendants or law firms to refuse to hire black lawyers on the grounds that this was what their customers and clients preferred.

Despite the urging of key Republican legislators, a Cabinet member, the Chairman of the U.S. Commission on Civil Rights, and other high Administration officials, President Bush vetoed the Act in October, after it had been passed by significant bipartisan majorities. In vetoing the bill, the President relied on the same misleading label his Administration had used throughout the debate over the bill — that the bill would require employers to adopt hiring "quotas." The Senate failed by a single vote to override the veto.

Just as disturbing as the Administration's actions was its rhetoric. The Administration's primary argument has been the claim that the Act, particularly its sections remedying the effect of *Wards Cove*, would cause employers to adopt job quotas. This assertion is flatly contradicted by the language of the bill itself, by the many quota opponents who support the Act, and by the fact that the Act would simply restore the principles of *Griggs*, which was the law for 18 years and never produced such results. Despite its inaccuracy, however, the quota claim has sparked racial divisiveness, as exemplified by its use by David Duke and in the Helms-Gantt Senate race. It suggests a willingness by the Administration to exploit code words and racial division for purposes of political gain.

The Administration's other primary objection to the Act concerns the damages provision. Since the Administration has supported restoration of the full scope of 42 U.S.C. § 1981, which permits racial minorities to sue for damages, the primary effect of the Administration's position would be to deprive victims of intentional discrimination on the basis of sex or disability of the same type of remedy. Notwithstanding the Administration's claims, it has failed to justify the extraordinary view that women or disabled people who suffer discrimination are somehow less deserving of complete and effective relief than other bias victims. On this issue as well, the Administration's position reveals a troubling lack of commitment to key civil rights principles.[34]

In summary, the Administration's handling of this legislative issue has created a climate which, if not changed, will unquestionably lead to increased, not decreased racial tension and conflict. The President alone can prevent this from happening.

V. Passage of the Americans with Disabilities Act

Hailed by many as the most significant civil rights legislation since the 1964 Civil Rights Act, the Americans with Disabilities Act ("ADA") will require all commercial enterprises, all government operations, employers with 15 or more employees, all public transportation services, most private transportation services, national communications networks, and the Congress to recognize the equal opportunity rights of people with mental and physical disabilities. Perhaps most important, the law should help to change the way America treats people with disabilities, and should pave the way for greater participation by disabled citizens in all aspects of society.

The only subject not covered by the ADA is discrimination in housing because the Congress enacted the Fair Housing Amendments Act in 1988, adding people with disabilities as a protected class. The various provisions of the ADA become effective at different times. The numerous agencies responsible for issuing regulations are in the process of drafting and publishing final regulations to meet the various statutory deadlines.

While the initiative for passage of the ADA came from members of Congress and advocacy groups, the Administration's support of the legislation never wavered as long as the general principles of the statute were at issue. However, when called upon to assist in resolving specific conflicts or in providing leadership in the Congress, the White House demurred.

While a candidate, then Vice President Bush endorsed the ADA. President Bush again endorsed the ADA in a pre-inaugural appearance and in a joint address to Congress after his inauguration. However, after the Senate held hearings on the ADA, the Administration began to express concerns about the ADA's scope, enforcement procedures, and expected impact on small businesses.

A number of conflicts developed during the course of the congressional debate on the bill. When Senator William Armstrong (R., CO) proposed an amendment on the floor of the Senate to exclude people with certain mental disabilities from the protections of the bill, the White House failed to lobby to keep them covered under the bill. With no White House pressure to oppose the measure, the Armstrong Amendment passed. As a result, the ADA excludes people with 11 different types of mental disabilities from the protections of the ADA for no rational reason.

A second conflict erupted with the introduction during consideration of the bill in the House of Representatives of an amendment by Congressman Jim Chapman (D.,TX) concerning the coverage of people who test positive with the HIV virus. The Chapman Amendment prevents people who test positive for the HIV virus from working in restaurants and other food-handling enterprises. Both this and the Armstrong Amendment tested the core policy of the ADA that people with disabilities must be judged on the basis of objective data and not on fears and misperceptions about their abilities or about risks that their disabilities are assumed to pose to others. Neither Senator Armstrong nor Representative Chapman hid the purpose of their amendments. Senator Armstrong asserted that his would protect the ability of employers to make decisions based on "bona fide religious and moral" grounds. Representative Chapman eschewed medical facts about the transmission of AIDS, saying that his amendment was about perception and not about reality. The disability and civil rights communities waited in vain for the White House to fight these amendments with an effort that would have been consistent with President Bush's early and repeated support of the principles and goals of the ADA. Indeed, versions of both amendments appear in the final language of the ADA.

The most highly publicized of the conflicts emerged in the context of remedies for violations of the ADA. The controversy over the scope of the remedies was tied to on-going efforts to pass the Civil Rights Act of 1990, with advocates for those with disabilities urging that remedies for discrimination under ADA should be consistent with remedies for minorities, women, and others protected under Title VII of the 1964 Civil Rights Act. The White House strongly lobbied for more limited remedies for people with disabilities. While the Administration did not prevail, the veto of the Civil Rights Act of 1990 means that there are still inconsistencies between remedies available for different classes of victims of discrimination.

Several federal agencies are in the process of drafting and publishing final regulations to implement the ADA, and the Office of Management and Budget has required each of them to submit the drafts for pre-publication review. In spite of the detailed language of the ADA, the regulations will be critical in determining whether the promises of the ADA will be fulfilled. How the final regulations read will provide a true gauge of the extent and depth of President Bush's support of disability rights.

Among the issues that now hang in the balance are the following: Will President Bush restrain OMB's efforts to impose narrowly conceived cost/benefit analyses on the regulations? Will he ensure that the regulations meet their statutorily-mandated publication deadlines? Will he permit the business community to revisit questions about cost that were resolved in the Congress? Will he ask Congress to appropriate sufficient funds for the enforcement and technical assistance provisions of the Act? Until these questions are answered, neither the effectiveness of the law nor the President's commitment to its goals can be measured fully.

VI. Civil Rights Policy and Law Enforcement

A. INTRODUCTION

Critical enforcement and policy decisions concerning civil rights are made by the Department of Justice, the Equal Employment Opportunity Commission ("EEOC"), and at the sub-cabinet level in various offices in the Labor Department, Department of Education, and Department of Housing and Urban Development ("HUD").[35] To each, President Bush has appointed new administrators — Evan Kemp to Chair the EEOC; Cari Dominquez to head the Labor Department's Office of Federal Contract Compliance Programs ("OFCCP"); Michael Williams as Assistant Education Secretary for Civil Rights to head the Office of Civil Rights ("OCR"); and Gordon Mansfield as Assistant Secretary in charge of the Office of Fair Housing and Equal Opportunity at HUD.

These new appointees represent a marked change from the Reagan era. As at the Civil Rights Division of Justice, these appointees have tried to repair damaged relations with the civil rights community, and have promised stepped-up efforts to enforce civil rights laws. Two years into the Bush administration, however, there are few real signs of increased law enforcement.

One critical problem may be morale. After eight years of hostility to civil rights enforcement, and eight years of budget cuts, many agencies have lost the corps of dedicated civil servants essential to creative policymaking and effective law enforcement. Rebuilding the administrative infrastructure remains a task of the highest priority.

This section summarizes the Bush Administration's current policy and law enforcement efforts in the areas of voting rights, employment, education, and housing.

B. VOTING

Voting rights enforcement represents a major shift from the policies of the Bush Administration and those of its predecessor.[36] Although major issues undoubtedly will emerge as redistricting occurs in 1991 following the 1990 census, voting rights enforcement has improved dramatically under the Bush Administration. Major questions remain regarding the accuracy of the 1990 census.[37]

Assistant Attorney General Dunne has repeatedly stated his goal of vigorously enforcing the Voting Rights Act,[38] and the Department appears to be making good on its promise, particularly in regard to Section 2 of the Voting Rights Act, which prohibits discriminatory voting practices. The Department has filed and prosecuted a number of important high-profile lawsuits, including *United States v. Georgia*, the lawsuit challenging Georgia's majority vote/run-off requirement, and *United States v. Los Angeles County*, (filed during the Reagan Administration, but tried in 1989), the lawsuit challenging racial gerrymandering against Hispanics in county supervisors' redistricting in Los Angeles County.

The Justice Department has also worked with minority plaintiffs in a number of important voting rights cases. These include *LULAC* v. *Clements*, the Texas lawsuit challenging at-large elections for state court judges, an emerging area of voting rights law. In that case, the plaintiffs sought to invalidate at-large judicial elections under Section 2 of the Voting Rights Act. Despite the trial judge's findings that the at-large elections discriminated against Hispanic and black voters in a number of Texas judicial districts, a panel of the U.S. Court of Appeals for the Fifth Circuit ruled that methods of election for state court trial judges were not covered by the anti-discrimination prohibitions of Section 2. The case was then reheard *en banc* by the Fifth Circuit, with Dunne arguing the Department's position that Section 2 covered at-large judicial elections. Nonetheless, the Fifth Circuit ruled against the Department and the plaintiffs, resulting in the dismissal of not only the Texas case, but also two judicial election cases in Louisiana. In late January, 1991 the Supreme Court agreed to review the *LULAC* case.

Although the Department has not yet taken a formal position in the Supreme Court in the *LULAC* case, its brief in another case reveals its support for the position of minority voters in *LULAC*, arguing in a certiorari petition that the Fifth Circuit's *en banc* ruling is "contrary to the broad remedial purposes underlying the 1982 amendments to Section 2."[39] In two other important cases, the Department has filed briefs supporting plaintiffs' requests that the Court not review cases won by plaintiffs in the lower courts.[40]

The Department's record is not without flaws, however. In *Sanchez v. Bond*, Hispanic voters' claim that at-large county elections diluted their voting strength was rejected by the Tenth Circuit Court of Appeals in an opinion which substantially deviated from the standards set forth by the Supreme Court in the controlling case of *Thornburg v. Gingles*.[41] The Supreme Court asked for the Justice Department's views of the case, and the Department recommended that the Court not review the case. The Department prevailed, and the Court denied certiorari, leaving the troublesome precedent of the Tenth Circuit.

As for enforcement of Section 5 of the Voting Rights Act, which requires jurisdictions with a history of excluding minority voters to obtain clearance from the Justice Department before making changes in election and voting practices, the Department's record also appears to have improved. A number of objections to new laws creating at-large elections in Georgia, Louisiana, and Texas have been lodged by the Department.[42] Nonetheless, most Section 5 enforcement litigation appears to remain largely in the hands of private litigants.

The largest blemish on the record of the Department regarding voting rights is the Administration's continuing failure to support the National Voter Registration Bill, H.R. 2190 and S. 874. The bill was designed to eliminate existing barriers to voter registration, including restrictions on time and place of registration and restrictions on the appointments of deputy registrars. The bill also provides for automatic voter registration when eligible voters obtain a drivers' license ("motor voter"), mail-in registration, and voter registration with governmental agencies servicing the public, including unemployment and welfare offices. Each of these techniques has worked successfully in a number of states to increase electoral participation, without creating problems of fraud.[43]

It is well-documented[44] that voter registration barriers have a disproportionate impact on minority voters, and the legislation is expected to increase minority voter registration. Nonetheless, the Justice Department has failed to support the legislation without offering any proposal of its own.[45] Although the bill has been altered in a number of ways since the Administration's initial opposition, and although it was passed by the House of Representatives by a vote of 289 to 132 on February 6, 1990, no change in position has occurred at the Department.

The Department will be watched closely as it deals with redistricting issues produced by the 1990 Census. Civil rights groups seek redistricting that will maximize minority voting influence, and were concerned when the Republican National Committee counsel offered assistance and resources to civil rights groups seeking to create districts in which minority voters might constitute a majority. Such "packed" districts could ultimately be advantageous to the Republican party if they were created in a way that also created districts where Republicans might virtually be guaranteed election. Such a consequence might well violate the Voting Rights Act prohibition of minority vote dilution. How the Justice Department handles this important issue will provide a basis for judging its performance in the voting rights area.

C. EMPLOYMENT

1. EMPLOYMENT POLICY ISSUES

In the area of employment rights, little improvement can be seen in examining the record of the last two years. While the performance of the Equal Employment Opportunity Commission ("EEOC"), the Labor Department's Office of Federal Contract Compliance ("OFCCP"), and the Department of Justice have improved slightly, no comprehensive policy agenda has been formulated to respond to the critical employment issues facing the workforce in the 1990s.

These issues include the wage gap experienced by women and by black and Hispanic men, and serious questions of child care and leave policies for the millions of American workers with dual work and family responsibilities. The President's record on these issues is disappointing. With the exception of his support for the Americans with Disabilities Act, the Administration has opposed or resisted a number of legislative initiatives drafted to address critical workplace issues. President Bush has vetoed:

a. The Civil Rights Act of 1990, discussed in detail above and in Part Two, below.

b. The Family and Medical Leave Act of 1990, which provided for job security to workers who must take unpaid leave to care for their families or for their own serious health conditions.

c. The Minimum Wage Restoration Act of 1989, which would have restored the purchasing power of the 1981 minimum wage of $3.35 per hour. Several months later, the President agreed to a smaller increase, in exchange for a new, and lower, minimum wage for teenagers and trainees.

Throughout the 101st Congress, the President threatened to veto comprehensive child care legislation, a threat which complicated passage of the legislation. At the end of the Congress, a child care initiative was included in the comprehensive Budget Reconciliation bill and was enacted into law.

2. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

At the agencies charged with enforcing federal antidiscrimination laws, there have been some improvements since the Reagan years. At the EEOC, Chairman Evan Kemp, who has served as an EEOC Commissioner since 1987, has a history of experience with equal opportunity enforcement through his tenure on the Commission and his years as a disability rights advocate. Under his leadership, the Commission has reduced its backlog of charges, although the time it takes to process charges is still nearly three times as long as the agency took in 1980.

The agency's record for providing favorable case resolution to claimants remains poor, with only 14.9 percent of charges settled, while 55.4 percent of all charges resulted in no-cause findings for discrimination in 1989. Moreover, despite increases in the total number of cases filed by the agency (486 cases in FY 1989), the EEOC persistently fails to file class action litigation, a more cost-effective method for achieving progress. Of the 486 total cases in 1989, only 94 were class actions.

On several matters the agency has issued policy guidance to its investigative staff (which provide important indicators of policy for the public as well), and Chairman Kemp has pointed to several issues he intends to focus on. These include:

a. Gender- and race-based stereotyping that create artificial barriers to the advancement of women and people of color to upper management and leadership positions (often known as "glass ceiling" issues). Kemp has announced that the agency will target this type of discrimination, but no concrete proposals have been forthcoming.

b. Gender-specific workplace exclusion policies that bar women of childbearing age from industrial jobs. In January, 1990 the agency issued a policy guidance apparently designed to resolve conflicting positions it had taken in compliance manuals, legal briefs, and a 1988 policy guidance. The 1990 policy guidance was also in response to a troubling decision of the Seventh Circuit Court of Appeals in the case of *UAW v. Johnson Controls*, in which the court upheld an automotive battery manufacturer's practice of excluding all women of childbearing capacity from jobs that could expose them to lead, based on the employer's fear of possible harm to potential fetuses. The ruling approved the exclusion regardless of whether the women intended to or were likely to have children, and it ignored the potential reproductive risks to male workers. The EEOC, in responding to the *Johnson Controls* case (which the Supreme Court currently has under review), instructed its investigative staff outside of the Seventh Circuit to disregard the decision, but the policy guidance left a number of unanswered questions.

c. Employer liability for favoritism because of sexual relationships, also known as sexual harassment. While a 1990 policy guidance receives general praise from women's rights advocates, the policy guidance suggests that employers may not be responsible for harassment committed by their agents and supervisors, thus eliminating a strong incentive for employers to police their own workplaces in an effort to eliminate this invidious form of sex discrimination.

d. Wage discrimination. The Commission has not pursued the continuing problem of wage discrimination. Cases filed under the Equal Pay Act are virtually nonexistent (only seven were filed in 1989), and the Commission has not attempted to prove wage discrimination under Title VII. However, it has released a policy guidance instructing its staff that religious institutions are covered by the Equal Pay Act and Title VII with respect to sex bias in wages.

3. OFFICE OF FEDERAL CONTRACT COMPLIANCE

The Office of Federal Contract Compliance of the Labor Department implements Executive Order 11246, as amended, which prohibits discrimination by federal contractors on the basis of sex, race, religion, or national origin, and requires contractors to take affirmative action to ensure equal employment opportunity. OFCCP enforcement and policymaking has improved under Cari Dominquez from its low point during the previous Administration.[46]

Under Ms. Dominquez' leadership, the office has undertaken comprehensive training of its investigative personnel and has developed a more uniform, focused review process. These improvements in training have netted results. In 1989, the OFCCP obtained a record recovery of $21.6 million for 6,634 individuals, which includes a $14 million settlement in the eleven-year-old case against Chicago's Harris Bank. In 1990, it completed 2,855 conciliation agreements, a record number.

In the policymaking arena, the office has developed a "glass ceiling" initiative to examine corporate succession plans to see how employees are selected for key high-level jobs. It has also announced plans to target the employment of women in the construction industry and has comprehensively updated and revised its Compliance Manual.

OFCCP is also vigorously defending its enforcement authority in three pending cases, *Board of Governors of the University of North Carolina v. Department of Labor* in the Fourth Circuit Court of Appeals, *U.S. Air v Dole* also in the Fourth Circuit Court of Appeals, and *Stouffer Foods Corp. v. Dole*, still at the district court level.[47]

D. EDUCATION

Halfway through its term, the Bush Administration faces critical questions concerning equal education opportunity, and the signs on how it is approaching them are not promising. The President has stated often a desire to be the "education President," and he joined with the nation's governors in announcing national education goals. Yet, those education goals virtually ignored barriers faced by minorities, students with disabilities, and students with limited proficiency in English who could find themselves even further behind without attention to their particular needs and without proper enforcement of the laws providing for equal educational opportunity.

As for higher education, minority access continues to be limited. Data demonstrate that higher education has had a profoundly positive effect on the improvement in the economic status of black Americans.[48] Nonetheless, federal policy during the 1980s did not encourage minority access to education. The reduction of federal grant money, and the shift in federal policy from direct aid to high-cost college loans had a serious impact on minority students.[49]

Current rates of college participation indicate that Hispanics and blacks continue to lag behind whites in college enrollment, and that the rate of participation is lowest for black men.[50] Between 1987 and 1989 the number of degrees awarded to minorities did increase, although the increases varied among racial and ethnic minority groups. The number of bachelor's degrees awarded to Hispanics and Asian Americans increased 10.4 percent and 17.2 percent, respectively, while the gains of blacks and American Indians were much smaller — 2.6 percent and 1.8 percent, respectively.[51]

Responsibility for equal educational opportunities rests both with the Civil Rights Division of the Justice Department and with the Office of Civil Rights in the Department of Education. Each office has indicated a desire to reverse the overt hostility toward desegregation in education which existed in the Reagan Administration, and each has made some changes in policies. The new leadership in both offices continue to promise increases in enforcement. However, beyond the rhetoric, few, if any, significant policy shifts are apparent. Moreover, in the case of the Office of Civil Rights, its effort to "clarify" the law regarding minority scholarships raised troubling questions about the Administration's commitment to minority access to higher education.

1. OFFICE OF CIVIL RIGHTS

The Bush Administration waited nearly fifteen months before selecting Michael L. Williams to serve as Assistant Secretary for Civil Rights at the Education Department.[52] During Williams' confirmation hearing, he pledged to vigorously enforce the law, and to work more effectively than the prior Administration with civil rights groups by maintaining an "open door policy" and by seeking their "advice and counsel on the operations and policies of OCR."[53] He also outlined several policy initiatives he planned to undertake.

In early December 1990, Williams announced that scholarships directed to minority students based on race constituted illegal discrimination under Title VI of the 1964 Civil Rights Act. The policy was roundly criticized, and the Administration shortly retracted it. A new policy was then announced, not by regulation or notice, but by press release in mid-December, 1990. That policy defines the legality of scholarship funds earmarked for minority students according to the source of the funds. Private scholarship funds administered by colleges or universities may restrict eligibility to minorities. Colleges and universities, however, may not fund "race-exclusive" scholarships with their own funds.

The new policy was also met with significant public outcry since it conflicts with Supreme Court precedent, as well as with federal policy of more than twenty years. As long ago as 1972, during the Nixon Administration, the Office of Civil Rights announced that student financial aid programs based on race or national origin did not violate civil rights laws as long as their purpose was to overcome the effects of past discrimination. Moreover, even during the Reagan Administration, the Office of Civil Rights determined that minority scholarships do not violate Title VI.

At his confirmation hearings on February 6, 1991, Education Secretary-designate Lamar Alexander indicated that he was suspending the latest policy and would revisit the entire issue of minority scholarships.[54] Alexander has some familiarity with the issues surrounding minority access to higher education and minority scholarships. When he was Governor of Tennesee, the state agreed to settle a suit that had been brought to challenge the state's segregated system of higher education. A key component of that settlement was a plan to select 75 black sophomores within the Tennessee higher education system to participate in a pre-professional training program. The settlement was ultimately approved, over the objections of the Reagan Justice Department, in 1984.[55]

Other than the initiative on minority scholarships, Williams has not implemented any policy changes that are apparent to observers of OCR. In December 1990, he unveiled an elaborate set of goals to restructure the agency, but no changes have yet been observed.

OCR has issued two policy statements concerning discrimination against pregnant students and discrimination against homeless, disabled children. Neither of these policy statements was accompanied by any specific guidance to school districts, nor are there any indications that OCR intends to monitor or otherwise enforce these policy directives. It is important to note that at the same time that OCR claims to be defining a new enforcement strategy, it has not referred a single case to the Justice Department for enforcement.

One positive note in the performance of OCR can be found in a case involving the school system of DeKalb County, Georgia. There, for the first time since 1982, OCR has terminated a school district's federal funding because of the district's refusal to provide OCR access to records necessary to investigate complaints concerning handicapped children.[56]

2. DEPARTMENT OF JUSTICE

During the Reagan era, the Justice Department actively encouraged school districts to seek declarations of "unitary status" in order to end court supervision after they had implemented plans for several years to remedy illegal segregation. In a positive step away from its predecessors, the Bush Justice Department has publicly affirmed that it has no current intention of encouraging school boards to seek an end to court-ordered desegregation plans.[57]

While the department's new policy is to be commended, its position before the Supreme Court in the recently-decided case of *Board of Education* v. *Dowell*, 59 U.S.L.W. 4061 (Jan. 15, 1991) revealed a continuing ambivalence toward school desegregation. At issue in that case was the request of the Board of Education of Oklahoma City that the district court end its supervision and permit the school board to implement a "neighborhood" assignment plan which would resegregate elementary schools. The district court had previously held that the school system had segregated its students by law, and had ordered that the school system implement a desegregation plan. In 1987, the district court found that the schools had become "unitary" and had dissolved the decree mandating the desegregation plan. The appeals court reversed and the school board sought Supreme Court review.

In *Dowell*, the Reagan Justice Department, participating as *amicus curiae*, had supported the position of the school district. But before the Supreme Court, the Bush Justice Department instead sought a remand of the case to the U.S. Court of Appeals for the Tenth Circuit to determine whether the district is in fact "unitary." In its January 15, 1991 decision, the Supreme Court ordered a remand, indicating that dissolution of a desegregation decree is appropriate where the school system's constitutional violation has ended. The Court, however, did not provide guidance on when dissolution is appropriate, did not define "unitariness," and did not provide guidance on a critical issue in the case, *i.e.*, whether continuing housing segregation should be considered a sufficient "vestige" of prior illegal school segregation to preclude the lifting of a court-ordered desegregation plan.

Although the Justice Department in its brief to the Supreme Court did step back from its previous position, oral argument in the case in October 1990 revealed that the Department's position has shifted less than might have been thought. While in previous cases, the Supreme Court has indicated that a school district is "unitary" if it has eliminated the "vestiges" of segregation,[58] and that a school district has complied with this mandate only if it has desegregated "every facet of school operations,"[59] the Court has not yet fully defined the extent of the "vestiges" which must be eliminated. In Oklahoma City, one of the vestiges which remains is housing segregation. If the school system is declared "unitary" and is permitted to reinstate a neighborhood school assignment plan, then the system would be effectively resegregated.

At oral argument, Solicitor General Kenneth Starr was questioned about the school board's continuing obligation to eliminate segregation "root and branch" when school segregation may have contributed to residential segregation patterns. Starr responded that as long as there has been good faith compliance with a desegregation decree residential segregation cannot be seen as a "vestige" of school segregation.[60] Starr further stated that as long as there has been an elimination of state support for segregation, the school board has no affirmative obligation to continue to operate under a desegregation plan even if the racial make-up of the schools revert to the same patterns that existed when the system was segregated. According to Starr, since residential segregation should not be seen as a vestige of school segregation, the school board has no obligation to attempt to affect neighborhood segregation.[61]

Starr's theory is flawed in several ways. First, it is based on an erroneous reading of the law. The Supreme Court in several cases clearly held that patterns of residential segregation were caused by segregation of the public schools. More troubling is the assumption underlying Starr's argument, *i.e.* that as long as a state which had a history of *de jure* segregation no longer sanctions segregation, then the state has no continuing obligation to eliminate the "effects" of that state-sponsored segregation after an unspecified period of time. If Starr's theory is pursued by the Justice Department when the lower court reviews the *Dowell* case and in other cases, the much-touted Administration shift may turn out to be illusory, for the Administration will be supporting a return to segregated "neighborhood" schools.

The Justice Department's record in other cases also continues to be troublesome. For example, it has filed suit to enjoin a teacher-assignment policy in Prince Georges County, Maryland, adopted as part of a desegregation plan to assure that schools could not be racially identified because their faculties were segregated. The Justice Department suit argues that the involuntary transfer of white teachers violated Title VII and no longer served a desegregation-related purpose. The District Court rejected the Justice Department's argument almost completely, noting that eliminating the earmarking of schools by the race of their faculty was particularly important when the plan being implemented called upon parents to make choices among several schools.

The Department is monitoring compliance with several voluntary desegregation plans after complaints that a number of school districts have failed to abide by their negotiated settlements, but as yet no enforcement actions have been initiated. Millions of parents, children, and young persons know that the promise of *Brown v. Board of Education* has not and is not being fulfilled in their lives. They are not and believe that they will not be provided with the opportunity of achieving their highest possibilities. Once again, we are planting the seeds of racial tension and conflict.

E. HOUSING

The Bush Administration has repeatedly declared that the enforcement of the Fair Housing Amendments Act of 1988 ranks among its most important priorities, and the Departments of Housing and Urban Development ("HUD") and Justice ("DOJ") have reportedly received clear mandates from the White House to pursue a policy of aggressive enforcement.

Fair housing enforcement efforts have improved significantly since the Reagan years. The Department of Justice has tripled its caseload, adopted a more expansive approach to the interpretation of the Fair Housing Act, aggressively pursued higher damage awards and stronger injunctive relief, and improved its working relationships with private fair housing organizations.

At HUD, too, the caseload has tripled, final interpretive regulations have been issued, and reports have finally been issued to Congress documenting the number and type of complaints and conciliations completed by HUD and documenting the race, sex, and ethnic origin of HUD program participants and beneficiaries. HUD has modified its interpretation of the requirements of the Fair Housing Initiatives Program ("FHIP") and distributed more than $3,000,000 in FHIP funding to private fair housing organizations, and has used its powers under the Fair Housing Amendments Act to seek higher damage awards.

Nonetheless, significant problems remain. The number of complaints received by HUD is still not as large as it should be given the broad new protected classes included in the new Fair Housing Act. HUD has been unable to complete its investigations and reasonable cause determinations within the statutorily mandated 100-day time period. A serious backlog of cases has developed, which threatens to undermine the entire federal enforcement effort. Equally important, the effort to certify state and local agencies having substantially equivalent fair housing laws and thus allow them to assume some of the burden of enforcement is far behind schedule. The consequences for HUD's backlog could become serious in 1992.

Although there has been improvement, neither HUD nor DOJ has succeeded in winning damage awards that compare with the best of the settlements obtained in private sector fair housing cases. HUD has yet to make any meaningful use of its new powers under the Fair Housing Amendments Act to file Secretary-initiated cases, and has failed to complete a new national study identifying the level of housing discrimination across the country. DOJ's response to important case referrals submitted by private organizations has been somewhat erratic, and although the Department has aggressively pursued "garden variety" cases, in recent months the number of new, complex "pattern or practice" cases undertaken by the Department has dwindled.

Furthermore, HUD has yet to issue final guidelines on the accessibility of new, multi-family housing. While the initial proposed guidelines appeared promising, the deadline for builders is March 12, 1991, and HUD's continued failure to issue final guidelines may be encouraging efforts by the building industry to delay the effective date of this statutory requirement. Section 504 housing cases have continued to languish, and HUD has moved far too slowly to fulfill its responsibility to amend Public Housing manuals to bring them into conformance with Section 504 and the Fair Housing Act.

As to the issues of disparate impact theory and race-conscious remedies, it remains to be seen whether the Reagan-era policies, which precluded use of those theories, will actually be rescinded. Although there are signs at both HUD and DOJ that opposition to using disparate impact theories or race-conscious remedies has softened, to date those policies have essentially been placed on hold.

VII. Conclusion: Emerging Issues

Several themes emerge from a comprehensive review of the civil rights policy and enforcement in the Bush Administration. There has been no one speech or statement setting forth the direction of civil rights policy although there has been much rhetoric from the President and his appointees about the need for equal opportunity. But the themes that emerge from a comprehensive review conflict with much of the rhetoric.

The Administration appears committed to continuing the Reagan Administration's insistence on limiting civil rights policy and remedies. The Administration demands race and gender "neutrality" in almost all areas from scholarships for minority students to tenant selection policies designed to prevent resegregation of public housing units. Aside from the inaccurate and misleading labeling of the Civil Rights Act of 1990 as a "quota" bill, the Administration has also rejected minority preferences in amendments to the reauthorization of the Education of the Handicapped Act, H.R. 1013,[62] and indicated its unwillingness to enforce portions of Perkins Vocational Education Act Amendments which provided funding for "sex equity" programs.[63]

In both the Oklahoma City school desegregation case, and in the cases concerning the Federal Communication Commission's minority set-aside policy, the Administration made clear its view that government, at both the local and the federal level, has virtually no affirmative obligation to overcome the vestiges of past discrimination. In addition, the Civil Rights Act veto indicates that the Bush Administration continues to be unwilling to acknowledge that unintended discrimination may nonetheless violate antidiscrimination laws, rejecting a major and well-established theory of civil rights law.

To be sure, there are some areas that are receiving attention. Passage of the Americans with Disabilities Act, more vigorous enforcement of voting rights and fair housing protections, and initiatives to address "glass ceiling" limitations are all important developments. But by insisting on race and gender neutrality, by refusing to acknowledge that unintended discrimination may well have discriminatory impact which reduces opportunity, the Administration is significantly narrowing the scope of civil rights protections.

The consequences of these policies is a return to post Reconstruction-era mentality, *i.e.*, that America has righted the legal wrongs of the past and, therefore, may be relieved of all affirmative obligations to repair the damage that resulted from past discrimination. But any reading of the facts of continuing disparities between groups in our society — minorities and whites, or women and men — demonstrates that those who still lag behind in both wages and opportunities are for the most part members of groups which have in the past borne the brunt of legal discrimination.

A civil rights policy that insists on "race and gender neutrality," and that rejects the continuing need for governmental and private action to overcome systemic practices that result in discrimination, may well provide a partisan advantage, playing as it does to the fears and resentments of many. In the long run, however, America will be better served by moral leadership that encourages equal opportunity for every American.

Finally, it is important that the performance of the Bush Administration be viewed not simply in comparison to that of its predecessor but in terms of contemporary needs. Those needs include not only the unfinished business of dealing with race and sex discrimination, but addressing the issues of removing language and other barriers for hundreds of thousands of new citizens, making guarantees of equal opportunity for disabled citizens a reality, and taking steps that dampen the growing conflicts and tensions among groups and that promote understanding and racial harmony.

Judged in terms of these needs, the Bush Administration actions of oiling up some of the civil rights machinery that had been allowed to rust, and of blunting some (but not all) of the harshest edges of Reagan policy is simply not sufficient. On balance, at this point, these policies have contributed to an escalation — not a de-escalation — of racial tensions. This nation cannot and must not continue to travel a road that leads to such a result.

Chapter III

Recommendations

PRESIDENTIAL LEADERSHIP

1. The Commission renews its call for the creation of a cabinet-level task force to address the issues surrounding inter-group tensions and conflicts. The President should instruct the Task Force on Inter-Group Tensions to develop and submit to him within sixty days a coordinated action plan for dealing with the causes and consequences of these conflicts.

The most serious domestic issue confronting our nation is the dismal state of race relations. At the same time that the 1990 Census shows the growing diversity of our nation, the gaps between whites and minorities continue to increase. The media are constantly calling our attention to racial conflict. Tensions between groups continue to grow at alarming rates.

In our 1989 report, the Commission urged the new President to establish an inter-agency, Cabinet-level task force to address immediately the problems of inter-group tensions and conflicts. Two years later, we renew our recommendation. The Task Force on Inter-Group Tensions should immediately evaluate the causes for increasing tensions and conflicts between and among whites and minority groups, and should, within sixty days, recommend to the President an action plan to address these problems.

2. We recommend that the President refrain from mislabeling the Civil Rights Act of 1991 as a "quota" bill and should support legislation to restore well-established principles of equal employment law, to assure that all victims of discrimination will be entitled to compensation for injuries, and to encourage parties to discrimination lawsuits to enter into settlements.

During the debate over the Civil Rights Act of 1990, the President and his staff used the highly-charged and racially-divisive rhetoric of "quotas" to justify the President's opposition and ultimate veto of the bill. The "quota" charge was a complete mislabeling of the legislation, which in fact specified that Congress was not authorizing, requiring or even encouraging quotas in enacting the legislation. Moreover, employers had not found it necessary to use "quotas" in order to comply with equal employment laws that were well-established for 18 years prior to a series of Supreme Court decisions in 1989 which radically altered equal employment law. Nonetheless, the President continued to characterize the bill as requiring "quotas."

The "quota" rhetoric heightened racial tensions which could lead to serious conflicts and was exploited by former Ku Klux Klanner David Duke in his Senate bid in Louisiana and by North Carolina Senator Jesse Helms in his successful effort to turn back challenger Harvey Gantt, who is black.

As set forth in detail in Chapters II and IV of this volume, the 1990 bill was drafted to overturn the Supreme Court decisions which had interpreted several key principles of equal employment law in a manner that severely limited the rights of victims of job discrimination. One of the key principles overturned by the Court and included in the legislation had been part of the fabric of the law since the unanimous 1971 Supreme Court decision in *Griggs* v. *Duke Power*. The *Griggs* principle, also known in the law as disparate impact theory, held that unintended discrimination may have a discriminatory impact which reduces equal opportunity and therefore violates the law.

Griggs resulted in a transformation in the American workplace as many companies, in response to *Griggs*, began to provide more job opportunities to women and minorities. The 1990 Civil Rights Act was intended to restore the *Griggs* standard to the law so that such opportunities would continue for women and minorities. The bill also included a number of other provisions, including one designed to ensure that victims of intentional sex discrimination have the same remedies under the law as victims of intentional race discrimination, and another that encourages settlements of discrimination suits.

Congressional sponsors of the 1990 Civil Rights Act have reintroduced the bill as the Civil Rights Act of 1991. The Commission urges the President to refrain from engaging in racially-divisive rhetoric and actions. We recommend that he obtain independent legal advice on the impact of the legislation and are confident that after receiving such counsel, he will support the 1991 Civil Rights Act.

3. We recommend that the President also support the following legislative proposals designed to promote equality and fairness:

The National Voter Registration Bill

It is well established that barriers to voter registration disproportionately affect minorities and act to prevent fulfillment of the promise of equality of participation which is at the core of the Voting Rights Act. Legislation designed to remove registration barriers has been pending for several years, and the Commission has endorsed such legislation in its prior reports and in testimony before a number of Congressional committees.

In the last Congress the House of Representatives passed a voter registration reform bill with many good features but the bill became stalled in the Senate. There is simply no way to know how unregistered voters will cast their ballots, and our democracy cannot justify the exclusion of voters because their votes may not please some currently in power. Voter participation in America is the lowest of all the Western democracies, and voter registration reform is likely to result in increased participation for both political parties. The President should endorse voter registration reform legislation to encourage voter participation from every citizen.

The Family and Medical Leave Act.

The Family and Medical Leave Act would provide job security to workers who must take unpaid leave in order to care for their families or for their own serious health conditions. The legislation addresses the needs of women and other workers with pressing family responsibilities who now must choose between their responsibilities in the workplace and their responsibilities to their families. President Bush supported family leave during the 1988 presidential campaign, but vetoed the legislation after it passed the Congress in 1990. Support of the Family and Medical Leave Act would demonstrate concretely both a commitment to a "kinder, gentler nation" and to measures that remove barriers to the participation of all citizens in the workforce.

4. We recommend that the President suspend the employer sanctions provision of the Immigration Reform and Control Act of 1986 while the law is reexamined.

The Immigration Reform and Control Act of 1986 has resulted in significant discrimination against foreign-looking or -sounding citizens and lawful residents. The Act, which penalizes employers for hiring illegal immigrants, has been the subject of significant criticism with many groups calling for repeal of the law. While the law is under review, the employer sanctions provisions which have caused discrimination must be suspended. The Commission believes that the entire act should be reevaluated in light of the experience since 1986.

JUDICIAL APPOINTMENTS

1. We recommend that the President seek greater diversity in his judicial appointments by selecting qualified women and minorities committed to equal justice under law regardless of political affiliation or ideology.

President Bush's judicial nominations have mirrored those of President Reagan: nearly exclusively white, male, and Republican. Many of President Bush's nominees also reflect the conservative ideology that is the hallmark of the Reagan judiciary. The danger is that the new judiciary will alter the traditional role of the federal courts—to protect the civil and constitutional rights of the least powerful citizens in our society.

If the federal judiciary is to continue to play its role as the independent protector of minority rights, it is essential that those who come before the courts have faith in the fairness of the system. If the federal judiciary remains overwhelmingly white and male, even at a time when more women and minorities have achieved great success in the legal profession, citizens' trust in the system is likely to be reduced. It is for that reason that it is important that the courts more accurately reflect the diversity in our nation. The President should appoint more women and minorities to the large number of vacancies which now exist. These nominees should be of the highest caliber, and their records should reflect personal and professional commitments to equal justice under law.

CIVIL RIGHTS POLICY AND REMEDIES

1. We recommend that the President direct the Executive agencies responsible for implementing the Americans with Disabilities Act to do so in a manner fully consistent with the language and goals of the Act. In addition, the President should urge the Congress to appropriate sufficient funds to ensure that the Act will be fully implemented.

Passage of the landmark Americans with Disabilities Act opens the door of opportunity to millions of Americans with disabilities. The President's support for the legislation was critical to its passage, and we commend him for this important expansion of civil rights. However, if the goals of the Act — to provide civil rights protections to people with disabilities so that they can fully participate in our society — are to be realized, enforcement of the law must be fully consistent with the goals and language of the Act. Moreover, the agencies that will enforce the Act must be provided with sufficient resources to adequately monitor and enforce compliance. The President should work with the Congress to ensure that appropriations for enforcement under the ADA are adequate.

2. We recommend that the President direct the departments and agencies of the federal government to revise civil rights policy to encourage the use of voluntary affirmative action plans and other affirmative remedies for violations of civil rights laws.

President Bush argued in justifying his veto of the Civil Rights Act of 1990 that civil rights policy should be based on a "colorblind" standard. That standard assumes erroneously that the legacy of past discrimination has been erased, and that America no longer has any obligation to continue to work to overcome the consequences of legal inequality which existed for more than a century.

Unfortunately, the legacy of discrimination remains, and is unlikely to be eradicated without affirmative action by governments or private parties. The nation has enough experience with affirmative action to implement policies that do not impair the need for qualified persons and that do not unduly trammel the interests of males and non-minorities. Federal policy should encourage affirmative action programs designed both to address past discrimination and to promote opportunity.

3. We recommend that the President direct the departments and agencies of the federal government to revise civil rights policy to encourage the use of "disparate impact" standards in employment and housing discrimination cases.

The Reagan administration took a backward step by directing civil rights enforcement agencies, particularly those enforcing fair housing laws and equal employment laws, not to pursue litigation under a "disparate impact" theory of liability. As set forth in detail in the working paper analyzing the veto of the 1990 Civil Rights Act in Part Two of this report, the "disparate impact" theory acknowledges that unintended discrimination may have consequences which reduce opportunities for full participation by minorities or women in the workplace. Since the 1971 *Griggs* case, courts have held employers responsible where an employee offers satisfactory proof that the employer's practice or practices resulted in inequitable or disparate impact on women or minorities, even if unintended. The disparate impact theory was also utilized by courts to find landlords responsible for violations of the fair housing law where the landlord's tenant selection policies resulted in a lack of opportunity for minorities to rent, even if there was little or no evidence of intent to discriminate.

The Bush administration has not permitted the use of the disparate impact standards in litigation. The result is that many minority citizens have no remedy when they are excluded from opportunities by practices that lack justification even though they are not prompted by racial animus. Since these kinds of practices constitute the great bulk of discrimination today, the Bush administration must change course if it is to have an effective civil rights program.

4. We recommend that the President direct the Department of Education and the Department of Justice to formulate a policy regarding "choice" in education that takes into account the impact of "choice" plans on efforts to achieve desegregation.

In the eyes of some, "choice" appears to be the latest miracle cure for the deficits of our nation's schools. "Choice" programs are currently operating in a number of states, and although there is some variation, most "choice" programs permit parents to select a school for their child from among several options. To its promoters, "choice" will encourage all schools to excel in order to attract children. Others question whether "choice" is really a 1990's version of the 1950's "freedom of choice" programs which many jurisdictions established as a means of avoiding integration. Critical questions remain: will "choice" benefit all children; will low income parents be given the information and the resources (including transportation) that will enable them to make meaningful choices; what will happen to public schools not chosen; will "choice" result in segregation or resegregation by either race, ethnicity, or economic status; will "choice" programs divert attention from the hard work of restructuring the schools for the short-term benefits "choice" may offer to some students.

While the Commission has not yet conducted a full study of "choice," we firmly believe that "choice" programs should not be permitted to operate if their consequence is resegregation. Neither should "choice" preclude needed restructuring in many school systems. A comprehensive review of "choice" programs already in place should be undertaken by the Department of Education to determine their impact on desegregation. Such review should also assess whether "choice" programs are in fact educationally sound, and whether they foster diversity, tolerance and understanding. Until such a review is concluded, the Commission recommends that the Departments of Education and Justice withhold support or assistance from "choice" programs.

5. We recommend that the President direct the Department of Justice to develop a legal policy preventing the dissolution of court orders mandating school desegregation until all vestiges of prior discrimination are eliminated to the greatest extent practicable.

Following the Supreme Court's recent decision in the case of *Dowell* v. *Board of Education of Oklahoma City*, the Justice Department announced that it would not encourage school boards to seek an end to court-ordered desegregation plans as the Civil Rights Division had done during the prior administration. The Department's announcement is a welcome shift from the policy of its predecessors. Nonetheless, critical questions remain concerning the dissolution of desegregation orders and the Justice Department's policies.

As set forth in detail in the working paper on Elementary and Secondary Education in Part Two of this report, in the *Dowell* case, the Supreme Court addressed the issue of when a school district should be found to have achieved "unitary" status and released from requirements that it comply with a court ordered desegregation plan. In a series of school desegregation cases, the Supreme Court had stated that only after all vestiges of prior illegal discrimination had been eliminated should a school system be declared "unitary." In *Dowell*, the Supreme Court indicated that continuing patterns of housing segregation may be a vestige of past illegal school segregation, but did not provide clear guidance about the circumstances in which continuing housing discrimination should preclude the dissolution of a court ordered desegregation decree.

The Commission believes that school desegregation decrees should not be dissolved until all vestiges of prior discrimination have been eliminated. These vestiges include housing segregation, as well as educational deficits that continue as a result of prior school segregation. The Commission urges the Justice Department to adopt a clear policy that precludes dissolution of court decrees until all vestiges of prior segregation have been eliminated. The Department should also formulate policies on whether districts that have achieved unitary status are free to adopt "neighborhood" assignment plans even with the foreknowledge that such plans will result in resegregation.

6. We recommend that the President direct the Department of Education to undertake additional initiatives to address the critical needs of the rapidly-increasing number of language minority students, and should ensure that the Department and its program offices, including the Office of Civil Rights, receive sufficient resources to accomplish this goal.

The 1990 Census provides clear evidence of the enormous growth in the number of language minority immigrants who have settled in the United States. In past generations, the public schools in America provided the children of immigrants with the tools to move into the mainstream of society and make their way up the economic ladder. Without serious attention to the needs of this large and growing population, the current generation may not receive the same benefits from the public school system.

Inflation and nearly a decade of neglect by officials in the Department of Education have taken a large toll on the programs to provide services to language minority students. For FY 1991, the Title VII bilingual education program has nearly 47 percent fewer resources than it had in FY 1980. At the same time, the population of children with limited English proficiency continues to increase; one expert suggests that the number of language minority students is growing at two and one-half times the overall rate of increase of school-age children.

The needs of these children simply cannot be met without a signficant increase in the federal resources directed to bilingual education. But resources alone are not sufficient. There is also a critical shortage of teachers who have been trained to educate today's diverse, multi-cultural, multilingual population. The federal government must take the lead in encouraging institutions of higher education to revamp teacher training programs so that new teachers, as well as current teachers, arrive in the classroom with the full range of skills that are necessary in order to effectively educate diverse student populations.

One result of the current lack of appropriate teacher training for language minority students may be the over-inclusion of these students in special education programs. In many instances, language minority students are inappropriately placed in special education classes solely because of their limited English language skills. While the Office of Civil Rights has indicated that it will attempt to address this important problem through comprehensive compliance reviews, the Commission believes that such reviews should begin *immediately*. Where language minority students are properly placed in special education settings, it is critical that these children, too, receive linguistically-appropriate services.

7. We recommend that the President direct the Department of Education to return to the longstanding policy regarding minority scholarships which encouraged access to higher education for minorities.

It is well documented that access to higher education is a critical step up the ladder of economic success in our society. As set forth in detail in the working paper on Minority Access to Higher Education in Part Two of this report, during the 1980s minority access to higher education fell, and is only now beginning to recover.

President Bush's new Education Secretary Lamar Alexander has indicated that the much-criticized policy regarding minority scholarships which Education Department officials unveiled in December, 1990 will be reviewed, and a new policy put in place. The Commission believes that for minority access to higher education to continue, it is imperative that minority scholarships be available. The Commission urges that the new Secretary of Education adopt a policy which assures access and encourages minority participation in higher education.

PART TWO

Working Papers

Chapter IV

The Civil Rights Act of 1990 and the President's Veto

by Elliot M. Mincberg and Deborah L. Brake

I. Introduction

In vetoing the Civil Rights Act of 1990, President Bush ensured that the first major civil rights decision made by his Administration would be a controversial one, provoking strong bipartisan criticism from political, religious, and civil rights leaders. The Administration opposed the legislation from its inception, and later advanced positions that represented major retrenchments in the area of civil rights. The White House focus on quotas to the exclusion of all other issues came to dominate the tenor of the debate. The Administration's calculated use of the quota issue to rally support for its political agenda may have more longterm consequences than the veto itself. The veto, and the White House positions on the Act, stand as primary indicators by which to measure the Bush Administration's record on civil rights.

II. Civil Rights Law Before and After the Court's Recent Changes

The Civil Rights Act of 1990 emerged in response to recent Supreme Court decisions cutting back protections for victims of discrimination under federal civil rights statutes. In its 1988-89 term, the Supreme Court handed down a number of decisions that made it substantially more difficult for bias victims to obtain relief for civil rights violations, in some instances altering decades of established civil rights jurisprudence. Most of the decisions addressed by the legislation involve employment discrimination, although some of the cases have implications for discrimination in other contexts as well. In addition to restoring civil rights laws to the status they held before the Court's limiting decisions, the Civil Rights Act also addresses the inequality of remedies available to women and minorities subjected to intentional discrimination in employment.

A. TITLE VII AND THE LAW OF DISPARATE IMPACT

Some of the Court's most sweeping changes related to Title VII of the Civil Rights Act of 1964, which prohibits employers from discriminating in employment decisions based on race, color, religion, sex, or national origin. The Act applies to both public and private employers with fifteen or more employees. Persons discriminated against under Title VII may seek a range of remedies, including court orders to halt the discrimination, reinstatement, up to two years of backpay, and attorneys' fees. Compensatory damages for harm resulting from the discrimination and punitive damages to deter and punish employers are not available under Title VII.

Title VII applies to both intentional employment discrimination and to practices with discriminatory effects, regardless of any intent by the employer to discriminate. Title VII lawsuits generally proceed under one of two theories: disparate treatment or disparate impact. Where an employer intentionally discriminates, an employee generally seeks to prove unlawful discrimination under disparate treatment analysis. A disparate treatment case challenges an employer for singling out women or minorities for unequal treatment in the workplace. Examples of disparate treatment include the delegation of undesirable tasks to black employees and not similarly situated white employees,[1] or a layoff system intentionally structured to lay off more women than men.[2]

Practices that do not single out women or minorities for disparate treatment may still be unlawful under Title VII's disparate impact analysis. The Supreme Court established the basic rules of disparate impact law in *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971), widely regarded as one of the most important court decisions in the history of employment discrimination law.[3] In *Griggs*, employees successfully challenged the employer's reliance on paper and pencil tests and a high school diploma requirement to hire power plant workers where these criteria, although not intended to discriminate, had a discriminatory impact on black applicants and were not shown to predict actual job performance. As Chief Justice Burger stated for a unanimous Court, Title VII reaches not just overt discrimination, "but also practices that are fair in form, but discriminatory in operation."[4] The Court reasoned that disparate impact is unlawful discrimination, regardless of an employer's motivation, because Congress "directed the thrust of the Act to the *consequences* of employment practices."[5] According to the Court, "the touchstone is business necessity."[6] Disparate impact theory assumes that non-job related criteria that disadvantage women or minorities should not restrict employment opportunities by acting as a proxy for discrimination.

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Griggs has served as the basis for disparate impact claims for almost twenty years. Plaintiffs have relied on *Griggs* to prove disparate impact by showing that employment practices operate to create a significant discriminatory impact against women or minorities. The relevant comparison group for proving disparate impact is the qualified applicant pool rather than the general population.[7] An employer can directly rebut a disparate impact case by attacking the plaintiff's statistical proof, challenging the employee's comparison group, or questioning the sample size relied on.

Under *Griggs*, if a plaintiff succeeded in proving disparate impact, the employer could still avoid liability by establishing that the practice in question was justified by business necessity.[8] Until recently, the courts have consistently treated business necessity as an affirmative defense, placing the burden of proof on employers to prove the defense.[9]

To establish business necessity under *Griggs*, an employer must defend the practice as serving its employment-related needs. The importance of the business interest served and the closeness of the relationship between the interest and the challenged practice have been the subject of varying formulations. Justice Burger's opinion in *Griggs* itself uses several phrases, including "significantly related to successful job performance,"[10] "manifest relationship to the employment in question,"[11] and bearing a "demonstrable relationship to successful performance of the jobs,"[12] to describe business necessity. Subsequent Supreme Court decisions have interpreted *Griggs* to stand for various formulations, such as "necessary to safe and efficient job performance,"[13] and "significantly correlated with important elements of work behavior."[14] As a result, some lower courts applying the business necessity defense have required a significant correlation to job performance,[15] while others have mandated that the practice be essential to effective job performance or necessary to the operation of the business.[16] However, at a minimum, business necessity has been construed to require that the justification bear an important relationship to the employment in question, even if the practice is not essential in a strict sense.[17]

In the nearly two decades since the Court decided *Griggs*, the decision has been relied on in hundreds of cases to strike down discriminatory practices which unnecessarily discriminate along racial and gender lines.[18] Minority employment in municipal fire and police departments, for example, increased tremendously after *Griggs*.[19] Courts have struck down height and weight requirements which systematically exclude women from the workplace,[20] tests which measure abilities to perform jobs other than the job applied for,[21] and other practices which significantly disadvantage women and minorities, and yet do not contribute to an effective workforce.

In recent years especially, the law of disparate impact has become particularly important to the goal of ensuring equal opportunity in the workplace. As blatant, purposeful discrimination has diminished, subtle barriers have taken on a relatively greater role in obstructing women and minority advancement.[22] Even where systemic discrimination in the workforce is intentional, sophisticated employers may succeed in concealing their motivations, making it virtually impossible for employees to gather sufficient evidence to prove discriminatory intent.[23] In such instances, employees can still bring a disparate impact lawsuit challenging the discriminatory practice.

In addition, disparate impact law provides the only basis for challenging workplace discrimination that results not from racial animus but from ignorance, inadvertence, or tradition. Where discriminatory barriers are unrelated to job performance, disparate impact law reflects the need to eliminate the "built-in headwinds"[24] that result in the racial and gender stratification of the workforce. The persistence of significant disparities between women and minorities and other workers who hold desirable jobs underscores the need for continuing efforts to provide equal access to employment opportunities regardless of race or sex.[25]

Changes in the structure and composition of the workforce also underscore the need for employment selection criteria which accurately reflect job abilities rather than race and gender biases. In the 1980's and 1990's the nation is experiencing a tremendous diversification of the workforce, as more women and minorities enter the labor market, and a growing shortage of skilled workers. Between now and the year 2000, 91% of the net growth in the workforce will be women and minorities. The use of selection criteria which unnecessarily discriminate against these groups will only impede the nation's goal of maintaining a qualified and productive workforce.[26]

At the same time that the composition of the workforce is diversifying, the types of jobs available are also changing. Standardized tests are likely to play a greater role in employee selection as the availability of jobs for unskilled workers declines.[27] In such an environment, disparate impact law will be increasingly important to ensure that such tests serve the purpose of selecting more efficient workers rather than merely obstructing the progress of already disadvantaged groups.

Unfortunately, at a time when disparate impact law has become increasingly important to eradicate discriminatory barriers in employment, the Supreme Court has effectively cut the heart out of disparate impact doctrine by increasing the burden of proving disparate impact, while at the same time making it substantially easier to establish business necessity. In one of the most controversial decisions of the 1989 Supreme Court term, *Wards Cove Packing Co., Inc. v. Atonio*, 109 S. Ct. 2115 (1989), the Court mandated three sweeping changes in the law of disparate impact, choosing not to limit its holding to the narrow grounds necessary to decide the case before it.

Two of these changes increased the ease with which employers can justify discriminatory practices based on business necessity. Before *Wards Cove*, as discussed above, once an employee proved disparate impact, the employer had the burden to prove that the discriminatory practice is justified by business necessity. After *Wards Cove*, plaintiffs bear the burden of proving that the practices are *not* justified by business necessity.[28] In addition to shifting the burden of proof, *Wards Cove* also loosened the definition of business necessity by requiring only that the practice "serves, in a significant way, the legitimate employment goals of the employer."[29] As Judge Posner has explained, the decision thus substantially "dilutes the 'necessity' in the 'business necessity' defense."[30]

The third significant *Wards Cove* change increased the burden on employees to prove disparate impact by requiring them to specifically identify each employment practice challenged, and to prove that each challenged practice results in significant disparate impact.[31] Prior to *Wards Cove*, employees could challenge selection systems involving multiple components without having to isolate or pinpoint the distinct impact of each component—a requirement which is often impossible given the inadequacy or nonexistence of employment records.[32] The legislative history of Title VII demonstrates that the law does not require the identification of single, specific components, but rather targets the "'systems' and 'effects'" of discrimination.[33] *Wards Cove* itself demonstrates the futility of disparate impact lawsuits where such particular identification is mandated, as the employer in that case had not preserved the records necessary to permit the employees to specify the independent effects of each practice.[34] Although disparate impact often results from the interaction of two or more practices, *Wards Cove* subjects only readily perceptible, identifiable, nonsubtle barriers to employee challenge.

Wards Cove represents a transformation of the law of disparate impact as previously understood. Before the Supreme Court decided *Wards Cove*, more than three hundred lower court decisions had required a more stringent showing of business necessity than the standard adopted in *Wards Cove*.[35] The lower courts have specifically recognized that *Wards Cove* "overruled the existing law"[36] and "modified the ground rules that most lower courts had followed in disparate impact cases."[37] In fact, in several Title VII cases, plaintiffs prevailed under *Griggs*, only to have the decisions reversed as a result of *Wards Cove*.[38] Employees and applicants will now be hard pressed to prove the existence of disparate impact, no matter how exclusionary or racially stratified their workplace. At the same time, plaintiffs who do succeed in demonstrating disparate impact will still have to prove that the challenged practice serves no colorable business aim in order to prevail. Because employees will find themselves in the difficult position of having to prove a negative—that no business reasons justify the practice—it will be substantially harder to bring successful disparate impact cases after *Wards Cove*.[39]

B. INTENTIONAL RACE DISCRIMINATION AND SECTION 1981

In addition to Title VII, an earlier anti-discrimination statute also prohibits race discrimination in employment and other contractual relationships. Adopted in the Reconstruction era, 42 U.S.C. 1981 prohibits racial discrimination in the "making and enforcing" of contracts, including employment contracts. Unlike Title VII, Section 1981 applies only to intentional discrimination. Although both laws regulate intentional race bias in employment, the statutes differ in their remedies and scope of coverage. Section 1981 authorizes more comprehensive remedies than those available under Title VII, including compensatory and punitive damages.[40] In addition, Section 1981 applies to conduct by all employers, including those with fewer than fifteen employees, which Title VII does not reach.[41] Section 1981 has been relied on extensively to prohibit a wide range of race discrimination in the workplace, including racial harassment and discriminatory changes in the status and terms of employment by both private and public employers.

The Court's recent decision in *Patterson v. McLean Credit Union*, 109 S. Ct. 2304 (1989), however, greatly restricted the scope of Section 1981. Although the Court refused to overrule an earlier decision holding that the statute applied to private as well as public contracts,[42] the Court drastically reduced the types of employer conduct governed by the statute. *Patterson* limited Section 1981's coverage to discrimination in the *making* of contracts, and concluded that this did not include racial harassment on the job. After *Patterson*, the statute does not apply to discrimination occurring after the formation of the contract, as long as the contract itself does not include explicitly racist terms. Consequently, employees who experience lost opportunities, emotional distress, and other damages resulting from intentional race discrimination or harassment after they are hired can no longer obtain compensation for their injuries.

Patterson has had a devastating impact on civil rights lawsuits filed in the lower courts. As of February, 1990, lower courts had dismissed over 200 claims under section 1981 because of the *Patterson* ruling.[43] Moreover, *Patterson's* implications have not been limited to racial harassment on the job. Lower courts have dismissed claims involving pay raises, terminations and demotions, changes from probationary to tenured status, and denials of promotions where the promotion would not have created a new and distinct contractual relationship.[44] In short, no matter how blatant or egregrious the discrimination, employees already in the workplace will ordinarily have no redress under section 1981 as interpreted by the Court in *Patterson*.

C. SECURING DISCRIMINATION REMEDIES IN THE COURTS

The effectiveness of civil rights enforcement depends on the ability of courts to fashion remedies. Until recently, where victims of discrimination have succeeded in obtaining court-ordered relief or settlements with their employers, courts have prohibited nonparties from forcing the plaintiffs to relitigate their remedies in a later challenge. The Court's recent decision in *Martin v. Wilks*, 109 S. Ct. 2180 (1989), made settlement agreements much more vulnerable to attack by third parties, discouraging both employers and employees from settling lawsuits before trial, and impairing the ability of courts to remedy discrimination.

Wilks itself exemplifies the disastrous consequences the Court's new rule will have on the stability of discrimination remedies. In *Wilks*, white firefighters challenged a court-approved plan by the City of Birmingham to remedy the virtual exclusion of blacks from jobs in the city's fire department. The challenge came years after the firefighters had learned of the plan and its effects on their interests. In the proceedings approving the plan, one group of white firefighters had already unsuccessfully challenged the remedy. *Wilks* involved the right of a second group of white firefighters to bring another lawsuit challenging the same remedial plan before a different judge on grounds already raised by the first group of white firefighters. The Supreme Court permitted the challenge, ruling that affected third parties can attack a consent decree terminating earlier civil rights litigation, even where they had declined to intervene in the original lawsuit, or where their positions were adequately represented by participants in the lawsuit. Under *Wilks*, employees who have spent years in anti-discrimination litigation must continually defend their court-ordered relief against persons who claim to be affected by the remedy, but who chose not to participate in the original lawsuit.[45] The prospect of endless and unpredictable litigation of court-ordered relief in the wake of *Wilks* is likely to deter employers from entering into settlement agreements, and deter discrimination victims from bringing meritorious lawsuits.

At the time Congress was considering the civil rights bill, the effects of *Wilks* were already visible. As of mid-January, the decision had resulted in an average of one new attack filed every three weeks on court orders remedying job bias, and the rate of such filings subsequently increased.[46] The number of job bias lawsuits and settlements that *Wilks* has discouraged is not as readily measurable, although both employers and civil rights lawyers expect *Wilks* to deter new lawsuits and settlements, in addition to spurring new attacks on existing remedies.[47]

D. PRACTICES ADOPTED WITH THE INTENT TO DISCRIMINATE: THE CHALLENGE OF GETTING INTO COURT

At the same time that the Supreme Court made it easier to challenge discrimination remedies, it made it harder for victims of intentional discrimination to bring civil rights claims to court. In *Lorance v. A.T.& T. Technologies, Inc.*, 109 S. Ct. 2261 (1989), the Court ruled that the time period during which an employee may challenge a discriminatory seniority system begins to run from the date of the system's adoption, rather than the date that an employee actually suffers its discriminatory effects.[48]

By forcing plaintiffs to choose between bringing a lawsuit in anticipation of the injuries that they might suffer in the future and forfeiting their ability to sue after experiencing injury, *Lorance* undercuts Title VII's purpose to facilitate the conciliatory resolution of employment discrimination lawsuits, and fosters premature litigation. Plaintiffs who recognize the potential for newly adopted policies to harm them in the future will have to file a lawsuit immediately or risk losing the right to sue. Other plaintiffs, who may not be aware at all of a company's discriminatory policy at the time of its adoption, may never be able to challenge it in court even if they are harmed by it. Although the Court's decision in *Lorance* itself concerned seniority policies which do not expressly discriminate, because very few policies actually state their discriminatory intent on the face of the policy, this rule immunizes from challenge the vast majority of discriminatory seniority systems. In addition, lower courts have applied *Lorance* to bar challenges to other types of employment practices as well as seniority systems.[49] After *Lorance*, many victims of intentionally discriminatory employment policies may never be able to seek redress in court.

E. MIXED MOTIVE EMPLOYMENT DISCRIMINATION UNDER TITLE VII

Another decision in the Court's 1988-89 term also restricted the ability of the civil rights laws to remedy intentional discrimination in employment. In *Price Waterhouse v. Hopkins*, 109 S. Ct. 1775 (1989), the Court decided for the first time that an employer who would have made the same decision absent discrimination is not answerable in court for its use of discriminatory factors in the decision-making process. As a result, where the employer can prove that nondiscriminatory factors would have produced the same decision, a plaintiff who proves that discrimination was also a factor in the decision cannot force the employer to stop the discrimination, and cannot require the employer to pay the employee's attorneys' fees. Before *Price Waterhouse*, plaintiffs could obtain attorneys' fees and injunctive relief ordering the employer to eliminate discrimination from its decision-making process, even if legitimate reasons alone would have produced the same decision.[50] After *Price-Waterhouse*, employers will have less incentive to eliminate discriminatory criteria from their decision-making process, particularly in decisions which rely on a variety of complex, subjective considerations such as partnership and tenure decisions.

F. RECOVERY OF ATTORNEYS' FEES BY VICTIMS OF DISCRIMINATION

Congress included in Title VII, and many other civil rights statutes, provisions authorizing courts to award attorneys' fees to prevailing plaintiffs in order to enable discrimination victims to perform the role of private attorney general in enforcing the civil rights laws.[51] This provision is especially important to secure the enforcement of Title VII, which provides no compensatory or punitive damages awards from which to pay attorneys' fees. Plaintiffs would have little incentive to go to court if the cost of obtaining adequate counsel would equal or exceed the value of backpay or reinstatement. Without the ability to recover attorneys' fees, most discrimination victims could not absorb the costs of litigation and would be unwilling to take their cases to court. The prospect of having to pay a plaintiff's attorneys' fees may also deter employers from discriminating in the first instance, or at least encourage prompt and reasonable settlement.

A number of Supreme Court decisions handed down over the past few years have restricted the availability of civil rights plaintiffs to obtain attorneys' fees from defendants. Most recently, in *Independent Federation of Flight Attendants v. Zipes*, 109 S. Ct. 2732 (1989), the Court ruled that plaintiffs cannot obtain fees spent to successfully defend discrimination remedies won in earlier litigation. After *Zipes*, and other Court decisions eroding the availability of attorneys' fees under Title VII,[52] lawyers willing to take job bias cases have become "an endangered species."[53] One federal judge has predicted that the dearth of competent counsel willing to pursue civil rights cases will turn back the clock on civil rights enforcement.[54]

III. Congress' Legislation vs. the Bush Response

A. THE CIVIL RIGHTS ACT OF 1990

Civil rights advocates introduced the Civil Rights Act of 1990 in order to reverse these Court decisions and restore civil rights protections to their previous stature, as well as to strengthen anti-discrimination remedies. Both the House and Senate passed the legislation by strong bi-partisan majorities.[55] Despite numerous attempts to reach accord with the Administration by supporters of the bill, President Bush vetoed the Civil Rights Act of 1990 on October 23, 1990. The Senate attempt to override the President's veto failed by one vote.[56] The bill's supporters have promised to reintroduce similar legislation at the beginning of the next Congress.

Although the final legislation sent to the President differed somewhat from the bill initially introduced in Congress, the Civil Rights Act of 1990 as it emerged from the legislative process continued to reflect Congress' intent to overturn the Supreme Court's civil rights retrenchments. The legislation includes a number of key provisions to restore legal protections against both intentional and unintentional discrimination.

1. DISPARATE IMPACT LAW AND THE *WARDS COVE* CHANGES

A primary concern addressed by the Act was to reestablish disparate impact law as it existed under *Griggs*. The Civil Rights Act overturns several aspects of the Supreme Court's decision in *Wards Cove* in an attempt to restore a fair balance between employers and employees in disparate impact cases. The Act replaces the Court's definition of business necessity in *Wards Cove* with a two-tiered definition distinguishing between employee selection and certain other business needs. Selection-related practices must bear a "significant relationship to successful performance of the job" to satisfy the business necessity test. However, in response to Administration and business concerns, an employer can justify other practices such as plant closings, bankruptcy, or methadone, alcohol, and tobacco use on the lesser showing that the practice is significantly related to a "manifest business objective." Under both definitions, employers must prove business necessity by "demonstrable evidence",[57] and not mere "unsubstantiated opinion and hearsay". In addition to overturning *Wards Cove's* definition of business necessity, the Act also shifts the burden of proof on business necessity back to the employer. Under the Act, as under *Griggs*, employers must prove business necessity in order to avoid liability once the plaintiff proves disparate impact.

The Act also addresses *Wards Cove's* redefinition of the burden of proving disparate impact. Under the Act, a plaintiff must show which specific practices are responsible for the disparate impact, unless the defendant fails to produce or did not maintain the necessary records. This provision represents a compromise between *Wards Cove* and prior law by requiring employees to challenge specific practices where possible, but does not insist on this level of specificity where it is impossible to attain due to the employer's failure to produce the essential records. Taken together, these changes restore disparate impact law as it existed before *Wards Cove*, lessening the burdens on bias victims imposed by that decision.[58]

The bill includes a number of provisions designed to ensure that the burden imposed on employers is a reasonable one and will not encourage them to resort to quotas. The mere existence of a statistical imbalance alone in an employer's workforce does not establish a case of disparate impact under the Act. An express anti-quota provision states that the bill cannot be interpreted to require or encourage quotas.[59]

2. SECURING RELIEF FROM INTENTIONAL DISCRIMINATION

The Act also strengthens legal protections against intentional discrimination by restoring the reach of section 1981 to include discriminatory conduct in the terms and conditions of the contractual relationship. This provision would overturn the Court's decision in *Patterson* and would again make intentional racial harassment in employment actionable under Section 1981.[60]

The Act also fills in a longstanding gap in federal civil rights protections by extending to women and other bias victims the right to recover damages for intentional discrimination and harassment. Victims of racial discrimination already have this right under section 1981. Because of the failure of the civil rights laws to provide monetary damages for nonracial employment discrimination, women who have suffered greatly from proven, intentional sex discrimination at work have been unable to recover compensation for their injuries.[61] To avoid the inequitable treatment of persons who have suffered employment discrimination, the bill provides for compensatory and punitive damages for all victims of intentional discrimination.[62] In a concession to the business community, the Act places a cap on punitive damages of $150,000, or the amount of compensatory damages, whichever is greater.

3. STABILIZING DISCRIMINATION REMEDIES

The Civil Rights Act overturns the Court's determination to permit the endless relitigation of employment discrimination remedies by persons who knew of the lawsuit and its potential effects, and chose not to participate. The bill partially reverses *Martin v. Wilks* and bars affected third persons from challenging court orders if they received adequate notice of the earlier litigation or if reasonable efforts had been made to provide them with notice, or if another party had already adequately represented their interests in the original litigation. By allowing such challenges where reasonable efforts were not made to provide potentially affected third persons with notice of the original decree, the bill permits a greater opportunity to challenge job bias decrees than existed before *Wilks*, when most courts followed a rule which virtually precluded such challenges.[63] The Act encourages persons to file their claims at the time relief is awarded instead of years later, restores the incentive for parties in a discrimination lawsuit to settle their disputes, and reestablishes the law's balance between the right to a day in court and the need for finality of judgments.

4. RESTORING ACCESS TO THE COURTS TO CHALLENGE PRACTICES ADOPTED WITH THE INTENT TO DISCRIMINATE

The Act eliminates the obstacles to filing a discrimination claim imposed on employees by the *Lorance* decision by treating the application of an employment policy adopted with the intent to discriminate as an unlawful practice. Consequently, the application of the practice, and not its mere adoption, starts the clock running for the purposes of measuring the time period during which injured parties may sue for discrimination.[64]

5. PROHIBITING MIXED-MOTIVE DISCRIMINATION

The legislation submitted to the President also restores Title VII's intent to make all intentional discrimination illegal, even if other legitimate considerations would have produced the same employment decision. This provision overturns *Price Waterhouse's* ruling that an employer can avoid liability by proving that it would have reached the same result anyway. Under the bill, proof that legitimate factors would have resulted in the same decision will prevent an employee from obtaining remedies such as backpay or reinstatement, but will not prevent an employer from otherwise being held accountable for discriminatory conduct.

6. ATTORNEYS' FEES AND OTHER PROVISIONS

The Act secures the availability of attorneys' fees to employees who prove that their employer engaged in illegal discrimination by overturning decisions restricting fee awards.[65] The bill reestablishes the effectiveness of Title VII enforcement by enabling discrimination victims to act as private attorneys general in bringing discrimination lawsuits.

The Act also includes a provision directing courts to construe civil rights protections broadly to effectuate their purposes. This provision represents an attempt to avoid the need for further legislation to correct additional formalistic and restrictive interpretations by the courts.

B. THE BUSH ADMINISTRATION'S RESPONSE TO THE CIVIL RIGHTS ACT

The Bush Administration's response to the Civil Rights Act of 1990 was extremely disappointing, and raises troubling questions about the Administration's civil rights policies. The Administration resisted legislative efforts to overturn the Court's recent civil rights decisions and consistently attacked the bill based on the allegation that it would result in workplace quotas. Civil rights leaders viewed the quota objection as a smokescreen for the Administration's actual agenda: to forestall civil rights legislation and create a divisive electoral issue appealing to "Reagan democrats" and white working class voters.

1. HISTORY OF THE ADMINISTRATION POSITION ON THE ACT

In response to the Supreme Court's 1989 decisions and early discussions about the need for a civil rights bill, the Bush Administration initially denied the need for any corrective legislation at all. Administration officials took the position that the Court's decisions effected only technical changes in civil rights laws.[66] This position was contradicted by conservative jurists who have acknowledged *Wards Cove's* transformation of disparate impact law,[67] and is even inconsistent with the position taken by the Department of Justice under Reagan that employers bear the burden of proving business necessity in Title VII cases.[68] When pressed further, White House officials promised to "study" the decisions and then recommend legislative action, if warranted.[69] At the time of the Act's introduction in Congress in February, 1990, however, no Administration actions or recommendations were forthcoming.

After the bill was introduced, the Administration publicly agreed that steps should be taken to overrule the *Patterson* and *Lorance* decisions, and proposed legislation to that end. However, even with respect to these two decisions, the Administration proposal failed to correct the harm produced by the Court's rulings.[70] Testifying against the bill in congressional hearings, Administration officials continued to deny the existence of any harm or change in the law resulting from the *Wards Cove*, *Wilks*, or *Price Waterhouse* decisions.[71] The Administration also opposed the Act's authorization of damages for all victims of intentional employment bias, making the extraordinary claim that victims of sexual discrimination should not receive the same types of remedies as race discrimination victims.[72]

Conflicting signals came from the White House beginning in May, as Administration officials alternatively threatened a veto and proclaimed that the President wanted to sign a civil rights bill.[73] Congressional consideration of the legislation and negotiations between the Administration and the bill's supporters continued through the fall. Although the details of the Administration's position changed frequently during this time, a common theme prevailed: continued repetition of the "quota" charge and repeated efforts to substitute alternative proposals for the Civil Rights Act. The Administration's alternatives purported to solve the problems addressed by the Act, but in fact failed to do so. In some instances, the Administration's proposals went beyond the Court decisions themselves to further weaken civil rights protections.

For example, the Administration supported an early opposition substitute which allegedly restored disparate impact law to its pre-*Wards Cove* state. However, in reality the substitute would have codified key aspects of *Wards Cove* which the Civil Rights Act sought to overrule.[74] In fact, civil rights plaintiffs would have encountered more difficulty proving disparate impact under the Administration's proposal than under *Wards Cove* itself, as the Administration substitute would have required bias victims to prove that a challenged practice was the underlying cause of disparate impact.[75] The substitute was quickly withdrawn by its sponsors due to lack of support.

Another Administration-backed proposal offered later in the summer would have gone further than the Supreme Court to legalize intentional mixed-motive discrimination, while purporting to address the *Price Waterhouse* decision. This proposal, introduced by Senator Kassebaum in the Senate and Representative LaFalce in the House, would have upheld all intentional discrimination that was not the "major contributing factor" in the employment action taken.[76] Under *Price Waterhouse*, discrimination which does not qualify as the major contributing factor may still be found unlawful if the discriminatory action would not have resulted absent the discriminatory factor. The House rejected the Administration-endorsed proposal by a wide margin.

This pattern continued in September, when White House Chief of Staff John Sununu offered a list of proposed revisions to the Act which caused civil rights advocates to question the good faith of the Administration negotiators.[77] Sununu's suggested changes included a proposal to allow employers to defend discriminatory practices on the grounds of "legitimate community or customer relations"—a basis never previously recognized by civil rights laws. This proposal sparked outrage by civil rights leaders, who pointed out that such a "customer relations" defense could permit racial or other bias by customers to justify discrimination. Advocates of the bill charged that the "customer preference" claim and the "quotas" issue were merely a subterfuge for the White House's unspoken agenda: to turn the clock back on civil rights protections.[78]

The White House renewed its threat to veto the legislation in late September, prompting the bill's advocates and sponsors to enter into a final round of negotiations with Republican Senators Hatch, Specter and Jeffords, and with William Coleman, a black Republican and Secretary of Transportation in the Ford Administration. The negotiations resulted in a number of changes which satisfied even Senator Hatch, a vigorous opponent of quotas, who indicated his support for the revised bill with the observation that he would never support a quota bill. The White House, however, remained dissatisfied. In late October of 1990, the Attorney General sent a memorandum to the President recommending a veto.[79] After agreeing to the compromise, Senator Hatch, who had insisted on a number of concessions by the legislation's proponents, withdrew his support for the bill to avoid opposing the President.

The final conference report incorporating the Hatch changes passed by strong majorities in both houses in mid-October,[80] and Congress sent the bill to the President on October 19, 1990. Despite the urging of many Republican as well as Democratic leaders, President Bush vetoed the legislation, relying primarily on the quota charge, and offered another alternative proposal based largely on the substitutes previously rejected by Congress.[81] In vetoing the Civil Rights Act of 1990, Bush joined Andrew Johnson and Ronald Reagan as the only Presidents in history to veto civil rights legislation. The Senate failed by a single vote to override the President's veto.[82]

2. AN ANALYSIS OF THE ADMINISTRATION'S POSITION

The Bush Administration's response to the Civil Rights Act disappointed those who had hoped for a "kinder and gentler" approach to civil rights issues. Although the Administration's final proposal with respect to civil rights legislation represented some improvement over its initial position, great differences remained between the White House alternative and the legislation passed by Congress. The Administration's proposed alternative would have adopted portions of *Wards Cove*, would have failed to remedy several other key aspects of the Court's 1989 decisions, and would have provided extremely restrictive remedies for victims of intentional sex discrimination. Moreoever, a number of the Administration's arguments against the Act, particularly the quota claim, were not only incorrect, but were also divisive and damaging to our nation's continuing dialogue on civil rights issues.

a. Disparate Impact Law and the quota issue

The primary argument used by the White House to generate opposition to the Civil Rights Act has been the claim that the Act's treatment of disparate impact law will result in widespread quotas. The Administration did not argue that the Act itself mandates quotas, but instead that employers will nevertheless adopt them in order to avoid litigation under the Act.

The problem with the Administration's quota argument begins with the inherent difficulty in attempting to defuse the emotional content of the claim and rationally analyze its merits. The very use of the term "quota" in this context is confusing and conjures up images of unqualified women or minorities depriving more deserving white or male workers of jobs and promotions.[83] To the extent that this is the message that the label is intended to convey, it is misleading. The law has never endorsed the use of quotas to hire unqualifed persons over qualified persons on the basis of racial or gender status, and in fact such practices would clearly subject employers to liability. To the extent that the label is applied to refer to lawful affirmative action, it is also misleading. Courts have generally upheld flexible numerical goals and timetables only in response to specific past discrimination, and only where the persons benefited have comparable qualifications.[84] Moreover, the Civil Rights Act does not contain any new authorization for any type of affirmative action, much less rigid quotas, but rather attempts to end existing discrimination in employment.

The use of the quota argument is not novel. The Department of Justice under the Reagan Administration had argued against applying disparate impact doctrine to subjective employment practices, such as job decisions based on the results of interviews or subjective supervisor evaluations, on the grounds that such practices cannot be validated and that employers will therefore resort to quotas. In making this argument, the Justice Department ignored statements by the American Psychological Association and numerous lower court decisions that subjective practices can be validated. A unanimous Supreme Court rejected the government's argument.[85]

The quotas argument also surfaced in the 1985 debate over Former Attorney General Meese's controversial attempt to rescind Executive Order 11246, requiring employers awarded federal contracts to make good faith efforts to increase minority representation in their workforces.[86] The effort ultimately failed in the face of widespread support for the Executive Order, even among the business community,[87] and because of the strong evidence that the Executive Order significantly contributed to minority employment.[88]

In fact, opponents of civil rights legislation have consistently challenged anti-discrimination laws as favoritism toward blacks. Even the Civil Rights Act of 1866 was denounced as special treatment for emancipated slaves.[89] The very success of the quota label, regardless of the content of the legislation to which it is attached, indicates the importance of critically analyzing such claims.

The White House use of the quota argument must be understood as part of the government's continuing retreat during the Reagan and Bush Administrations from the principles of disparate impact doctrine in general. As of 1989, the EEOC, the government agency charged with enforcing Title VII, had brought only one disparate impact lawsuit since 1983.[90] Given that the agency files between 300 and 600 Title VII lawsuits each year, the minimal attention to disparate impact violations—cases which ordinarily deal with systemic practices affecting large numbers of persons—is truly remarkable. By contrast, since 1980, the government has significantly increased the number of lawsuits brought on behalf of white males alleging "reverse discrimination." The government's low regard for disparate impact law contrasts sharply with the view of discrimination articulated by the Court in its landmark decision in *Griggs*.

Justice Burger's opinion in *Griggs* demonstrated an understanding that discrimination can continue to operate subtly, and even unintentionally, years after intentional, institutionalized discrimination has subsided. *Griggs* concerned itself more with finding solutions to continuing discriminatory impact than with assessing fault, and held that Title VII was intended to ensure that early educational and societal deficiencies and intentional bias do not continue to result in a "cumulative and invidious burden" on minorities in the job market.[91] Consequently, the Court was able to evaluate the unintentional exclusion of minorities from the workplace and conclude that practices which exclude minorities but do not measure job ability must be abandoned in order to eradicate discrimination from the work place. This reasonable, workable solution to lingering inequality has played a tremendous role in the diversification of the workplace without hurting business productivity.[92]

The reliance on the quota argument in the context of remedies for unintentional discrimination is particularly troublesome. In addition to confusing the issues by appealing to emotionalism, the claim itself is racially divisive. The issue is not really one of quotas, but whether white and male workers are entitled to insist that businesses continue to use selection practices which prefer white males over women and minority candidates, even though the practices do not measure ability to perform the job. However, by sounding the "quota" trumpet, the Administration has been able to obscure the issues sufficiently to capitalize on negative attitudes toward "reverse discrimination" in an economic climate which makes affirmative action a natural scapegoat. In doing so, the Administration has promoted a deceptively simplistic view of discrimination which does not recognize unintentional stereotyping in subjective hiring practices, or tests which screen out minorities while not predicting job performance, as legitimate problems for the law to address.

As a practical matter, the Administration's argument that businesses will adopt quotas in order to avoid having to defend against disparate impact lawsuits under the Act is untenable for a number of reasons. Initially, the language of the bill itself refutes such a claim. From its inception, the civil rights bill has made it clear that it would simply restore *Griggs* and would not promote quotas. The final Act passed by Congress expressly states that it codifies the *Griggs* treatment of business necessity and provides that none of the Act's provisions may be interpreted to cause or encourage employers to adopt quotas. In response to business and Administration concerns, the definition of "business necessity", taken literally from *Griggs*, was also modified to permit employers to defend non-selection related practices such as plant closings on the lesser showing that they are significantly related to any "manifest business objective." Other modifications further lessened the burden on businesses to litigate disparate impact lawsuits, including a provision permitting employers to submit a wide range of evidence to prove business necessity, such as prior successful experience; a provision making statistical proof alone insufficient to establish disparate impact; and the requirement that plaintiffs identify each practice challenged and prove its disparate impact unless the employer's failure to maintain or produce the relevant employment records makes this impossible.

Given the bill's unmistakable language, there is no reason to believe that the Civil Rights Act, in restoring the standards for business necessity under *Griggs*, would result in quotas when eighteen years of courts applying *Griggs* did not. When asked during congressional hearings on the bill to produce evidence that quotas existed under the prior law, neither the Administration nor any other witnesses could do so.[93] In fact, employers often won disparate impact cases under *Griggs*.[94]

In addition, the Administration's theory that employers will adopt quotas to avoid disparate impact lawsuits defies common sense. An attempt by an employer to artificially raise its percentage of minority employees in order to try to avoid litigating the disparate impact of specific job practices could not succeed, since the Supreme Court has ruled that the existence of a "balanced" overall workforce is not a defense to a claim that particular job practices have a disparate impact.[95] In fact, the adoption of quotas solely to avoid disparate impact litigation could well subject an employer to two lawsuits instead of one—a first lawsuit by minorities attacking job practices with a disparate impact, and a second lawsuit by white or male employees challenging the quotas themselves as illegal. There is simply no good reason to believe that rational employers would prefer this result to a reasoned review of their employment practices. Instead, most would undoubtedly continue to behave as they have under *Griggs* and seek to eliminate unnecessary job practices with a disparate impact.

The widespread support for the bill, and the identity of some of its supporters, also belie the claim that the legislation is a quota bill. Groups which have emphatically opposed quotas have also enthusiastically voiced their support for the bill.[96] Moderate and conservative Republicans in the Congress have made it clear that they would not have voted for the bill if there were a reasonable chance that it would lead to quotas.[97] Conservative columnists and journals often opposed to quotas and even some forms of affirmative action have also endorsed the legislation.[98]

The allegation that the Civil Rights Act would make it so easy for employees to win disparate impact cases that employers would have no choice but to adopt quotas also ignores the difficulty of proving a disparate impact case under the Act. Employers can disprove disparate impact by attacking elements of the employee's case such as statistical significance, sample size, the appropriateness of comparison groups, and the probative value of the statistics. These arguments alone were sufficient for the employers in *Wards Cove* to defeat the disparate impact case brought against them, even without proof of business necessity.[99] Moreover, a disparate impact case hinges on a comparison between the actual workforce and the *qualified* applicant pool; a comparison of minority representation in the workforce and minority representation in the general labor pool will not establish disparate impact. Consequently, the fear that unqualified minorities or women will obtain jobs instead of qualified white or male applicants has no basis in reality.

The quota debate has substantially diverted attention from the Administration's alternative proposal which, while purporting to resolve the problems created by *Wards Cove*, would have essentially enacted into law several aspects of the decision which are most damaging to plaintiffs. The Administration proposal defined business necessity as significantly related to job performance, or significantly related to a significant business objective, depending on whether the practice is defended as a measure of job performance or on the basis of other criteria. Although the Civil Rights Act also contains a two-tiered definition of business necessity contingent on the type of practice challenged, the Administration proposal made the applicable standard depend on how the employer chooses to defend the practice. As a result, the Administration proposal would have allowed employers to choose the more lenient standard to justify all business practices based on their relationship to any business objective. This broad standard, coupled with the Administration proposal's permissiveness as to the types of evidence acceptable to prove business necessity,[100] would have greatly

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tipped the scales in favor of employers in disparate impact litigation and effectively codified the *Wards Cove* definition of business necessity.

The Administration proposal also failed to correct the problems *Wards Cove* creates for employees attempting to prove disparate impact. The Administration bill required employees to prove that each particular practice challenged causes significant disparate impact unless the type of decision-making is not capable of separate analysis. The Administration bill would not have permitted challenges to groups of practices where employers have concealed or destroyed the records necessary to identify the effects of specific practices. The Administration stands alone in its view that each specific practice must have a provable significant disparate impact in order to be challenged. Cases decided prior to *Wards Cove* permitted challenges to groups of practices which had a combined disparate impact,[101] and the Federal Uniform Guidelines on Employee Selection Procedures supported this interpretation.[102] The Administration's contrary approach was even less amenable to disparate impact claims than the Reagan Justice Department's position.[103] The Administration proposal's failure to account for those situations where employees can document significant disparate impact resulting from a group of practices, but cannot attribute significant disparate impact to each individual practice, would have undermined Title VII's intent to eradicate the "'systems' and 'effects'" of discrimination.[104]

In an attempt to address its stated concern that civil rights legislation not lead to quotas, the Administration proposal also included language stating that the bill was not to be construed to require, permit or result in quotas. Unlike the Civil Rights Act passed by Congress, the Administration proposal omited any exception for court-ordered remedies to proven discrimination. This provision could be interpreted to prohibit all numerical relief in remedial orders, collective bargaining agreements, and affirmative action plans under Exec. Order 11246. So construed, the provision would have overturned prior Supreme Court decisions authorizing voluntary agreements and court-ordered goals and timetables that take into account race and gender.[105]

The Administration proposal's treatment of the business necessity defense and its proposed standards for proving disparate impact thus failed to correct many of the problems created by *Wards Cove*. Plaintiffs bringing lawsuits to challenge discriminatory practices in the workplace would have faced considerable obstacles if the Administration alternative became law. Overall, the Administration's position on this issue has represented a clear step backwards on civil rights in the 1990's.

b. Intentional discrimination: the scope of Section 1981 and the availability of damages

The Administration's proposal largely paralleled the Civil Rights Act in its provision to restore the reach of Section 1981 in the future to cover intentional discrimination during employment after the initial hiring decision. Hundreds of plaintiffs have already had their claims dismissed from court as a result of *Patterson*, however, including bias victims who obtained favorable awards at trial, only to have them reversed due to *Patterson* on appeal.[106] An important difference between the Administration and Congress over Section 1981's protection is that the Administration bill would not have provided relief for victims of intentional employment discrimination whose cases have already been thrown out under *Patterson*, while the Civil Rights Act would redress these grievances.

The Civil Rights Act and the Administration differ significantly with regard to the provision in the Act which would authorize damages for victims of intentional discrimination. The Administration initially opposed any monetary relief for employees who experience intentional non-racial discrimination. The need for such relief has been recognized by past EEOC Chairs appointed by both Republican and Democratic presidents, who have supported amending Title VII to authorize compensatory and punitive damages for victims of intentional discrimination.[107]

When President Bush vetoed the Civil Rights Act, he proposed an alternative bill that included "additional equitable relief" for victims of intentional bias. The "additional equitable relief" accepted in the Administration proposal, however, was much more restrictive than that provided by the Civil Rights Act. The Administration proposal limited all monetary awards to $150,000, and required the trial judge to assess monetary relief only where the court finds such an award necessary for deterrence and justified by the equities. If a court found this provision to violate the Seventh Amendment right to jury trial, the bill would have permitted the court to empanel a jury to determine liability, but not to assess the amount of the award.

Since Section 1981 does not place a cap on damages recoverable by victims of race discrimination, the Administration's limitation on damages primarily affected women. The Administration's proposal could well have deprived women of any monetary recovery for harms resulting from intentional discrimination. The provision's refusal to permit juries to assess monetary awards probably violated the Seventh Amendment right to jury trial on issues of law.[108] Damages have historically been regarded as legal in nature,[109] and the Seventh Amendment guarantees the right to have every legal issue tried by a jury.[110] The award permitted under the Administration bill would have resembled traditional damages at law,[111] and as such, is central to the right to jury trial.[112] The attachment of the label "equitable" to this provision would not avoid a Seventh Amendment violation where the nature of the award provided does not conform to this label.[113] If a court found that the Administration's requirement that only judges assess monetary relief violated the Seventh Amendment, it would probably strike the entire provision, leaving victims of discrimination with no monetary recourse whatsoever.[114]

Even assuming that discrimination victims would be able to obtain the limited relief authorized by this provision, the Administration position on damages remains highly questionable. The severe restriction of monetary awards for intentional sex discrimination would establish a two-tiered system of remedies for intentional discrimination, depending on whether it involves sexism or racism. No rationale justifies such different treatment of women and minorities who suffer intentional discrimination in employment. The claim that race discriminaton simply differs from sex discrimination is a hollow one. It is tenuous at best to compare the pain of victims of intentional dicrimination and conclude that one group suffers inherently more than another. Some of the worst accounts of harassment in the workplace have come from black women, whose ability to obtain damages under the Administration proposal would depend on whether a court determines that the harassment was prompted by racial or sexual animus.[115] Yet clearly, the harm suffered in these cases is just as egregious whether the motivation was race or sex discrimination.[116] The determination of which victims should receive damage awards to compensate for their injuries is precisely the sort of question properly answered by a jury hearing the individual case.

The Administration attempted to justify its "additional equitable relief" provision on the ground that the availability of damages would impair the remedial scheme established by Title VII, which provides a balance between remedying discrimination and maintaining a cooperative workplace. However, the Administration's claim belies the experience in intentional race bias cases, as victims of racial discrimination can already recover monetary damages under Section 1981. Title VII's remedial scheme currently coexists with a damages remedy for intentional race discrimination, and has remained intact to govern Title VII remedies such as backpay and reinstatement. The Administration has offered no evidence suggesting that Section 1981's damages remedy has undermined Title VII's remedial scheme, or has made workplaces any less conciliatory. Given this history, there is no reason to believe that Title VII and a damages remedy would coexist less easily when the discrimination claim is based on sex instead of race.

The Administration's rationale for imposing more restrictive limits than the Civil Rights Act on the availability and amount of monetary relief recoverable was also not persuasive. The Administration proposal required a court to make preliminary findings concerning deterrence and justification before awarding even a single penny of compensatory damages, a requirement not found in Section 1981. Moreover, the legislation passed by Congress would cap only punitive damages at $150,000, while the Administration proposal would have limited total monetary relief—both punitive and compensatory—to that amount. The Administration cited fears of crippling damage awards, voiced by the business community, as justification for its position. However, speculation that the unlimited availability of damages for intentional discrimination will devastate businesses has not been substantiated. A recent study by the D.C. law firm of Shea & Gardner for the National Women's Law Center found that of 576 section 1981 lawsuits filed over a ten year period, juries awarded compensatory or punitive damages in only 68 cases, and the vast majority of these awards were below $50,000.[117] In those very rare instances where monetary relief for proven injuries suffered by discrimination victims would exceed the Administration's statutory cap, the critical question is who should bear this loss—the victim who suffers the harm, or the employer responsible for the intentional wrongdoing? The Administration's response, that the victim should bear the loss, is not justified by fairness or economic stability.

c. Other differences between the Administration and the Civil Rights Act

Although disagreements over disparate impact doctrine and the issue of damages were at the forefront of the debate between civil rights proponents and the Bush Administration, other disputes over the proper scope of civil rights protection remain unresolved. In addition to the Act's *Wards Cove* and damages provisions, the Administration objected to a number of other provisions in the Act, including provisions protecting consent decrees from later challenge, the opportunity for plaintiffs to challenge intentionally discriminatory employment policies, the legality of mixed-motive discrimination, and the ability of plaintiff's lawyers to fully recover attorneys fees.

1. The Stability of Agreements to Remedy Discrimination

The Administration alternative to the bill's provision to stabilize remedies won by employees in employment discrimination lawsuits departed significantly from the Civil Rights Act, despite compromises made by the bill's supporters in an effort to reach agreement.[118] Attorney General Thornburgh, speaking for the Administration, first argued that *Wilks* did not change prior law. This argument ignored the fact that the doctrine barring later challenges to court decrees had been the rule in virtually every jurisdiction before *Wilks*.[119] After conceding, as it had to, that *Wilks* did effect a change in the law, the Administration next claimed that the bill's provision was unconstitutional. This position was contradicted by numerous court decisions and scholars, and even by the government's own brief submitted to the Court in *Wilks* itself.[120]

The final White House proposal accepted some modification of the *Martin v. Wilks* rule permitting unlimited third party actions to relitigate court-ordered remedies to proven discrimination. The Administration proposal forbade those challenges where the challenger had actual notice of the proposed judgment or order *and* was working for the employer or had applied for a job with the employer at the time of receiving notice. However, the Administration proposal would have permitted all challenges to existing judgments or orders where the challengers were not employees or applicants at the time the court ordered relief, even if previous litigation had already resolved those exact issues. Even persons who were employees or applicants at the time they received notice of the proposed relief, and who chose not to participate, could have later challenged the relief awarded if the actual notice received did not conform to the extensive notice requirements specified by the White House proposal.[121] Consequently, the Administration proposal incorporated virtually all of the troubling aspects of the *Wilks* decision that the Civil Rights Act seeks to correct.

The Administration justified its approach to nonparty challenges by arguing that joinder and class action devices will ensure fairness to discrimination victims. However, the adequacy of these procedural devices to ensure fairness to discrimination victims has been greatly contested. Joinder of nonparties is extremely difficult under the Federal Rules of Civil Procedure, and the use of class action devices in this context would force municipal governments to sue their entire labor force and each new job applicant, or to randomly select a particular employee or applicant to represent a defendant class. Thiry-two state governments have testified that these devices are not feasible in employment discrimination lawsuits.[122]

2. Opportunities for bringing discrimination lawsuits

The Administration proposal also attempted to mitigate the barriers created by *Lorance* for employees challenging discriminatory practices, although it again endorsed substantially less complete measures than those passed by Congress. The Administration proposal permitted persons injured by discriminatory practices to bring lawsuits after they suffer harm, but limited this relief to challenges to intentionally discriminatory seniority systems. Because lower courts have interpreted *Lorance* to bar lawsuits against nonseniority practices as well, such challenges would still have been prohibited under the Administration proposal perpetuating substantial harm to bias victims.[123]

3. Mixed Motive Discrimination under Title VII

The Administration alternative substantially adopted the Civil Rights Act's provision to overturn *Price Waterhouse* and reestablish the illegality of intentional discrimination which contributes to an adverse employment decision, but is not a "but for" cause of that decision.[124] The Administration had initially opposed this provision on the grounds that it was inconsistent with the law prior to *Price Waterhouse*, and that it would penalize "mere discriminatory thoughts." This earlier position endorsed a view more restrictive than that advanced by the Department of Justice under President Reagan in the government's brief submitted in *Price-Waterhouse*.[125]

4. Attorneys fees and other provisions

The Administration bill partially corrected the Court's assault on the availability of attorneys fees to prevailing victims of discrimination, although again the provisions were substantially less effective in providing for the full recovery of fees than the legislation passed by Congress.[126]

The Administration also declined to include any provision that civil rights statutes should be construed broadly by the courts. Civil rights advocates have warned that without such a provision, conservative judges appointed by the Reagan and Bush Administrations will continue to construe civil rights laws narrowly, again creating the need for corrective legislative action.[127]

The Administration alternative also differed from the Civil Rights Act by declining to provide for retroactivity in any of the bill's provisions. Although Congress had adopted several changes in an attempt to make the Act's retroactivity provision more acceptable to the White House,[128] negotiations did not produce agreement. The Administration has taken the position that the bill's retroactivity provision is unconstitutional, although it has offered no support for this proposition. Numerous authorities have held that Congress may apply legislation retroactively where it has a rational reason for doing so, and where retroactive application will not dictate the outcome of a particular case.[129] The absence of retroactivity will reward employees who wait to file discrimination claims until after legislation is passed, and will punish employees who diligently filed their cases earlier in reliance on pre-1989 caselaw. Many of these claims have been litigated for years in reliance on earlier cases and have been reversed, or will face reversal on appeal, because of the Court's recent decisions.

IV. Conclusion

To many, the debate over the Civil Rights Act of 1990 often may have seemed mired in technical detail and in charges and countercharges. But at the heart of the struggle were fundamental policy issues, the resolution of which will determine the future of efforts to assure equal job opportunity to all Americans.

If, as a recent report of the National Academy of Sciences concluded, "Title VII has had a tremendous effect on behavior in the U.S. labor market,"[130] much of that effect is due to the Supreme Court's unanimous decision in the *Griggs* case. As the Court later observed, "*Griggs* was rightly concerned" that deficiencies in education "not be allowed to work a cumulative and invidious burden on [minority] citizens for the remainder of their lives."[131] The *Griggs* decision reflected a pragmatic policy in which the key question to be asked about employment practices was whether they unnecessarily screened out minority and female workers who could do the job.

In labelling as "quotas" legislative efforts to restore the *Griggs* decision, the Bush Administration has signalled a major departure from equal employment policy of the past two decades. If the *Griggs* standard is not restored, systemic practices that disadvantage minorities and women in the workplace will not be subject to effective challenge. Victims of discrimination will be relegated principally to individual challenges to employer actions that are intentionally designed to discriminate. Even in these cases, important redress for women and other workers will be blocked if the Administration succeeds in its efforts to prevent an effective damage remedy.

The stakes are high, both for persons seeking equal opportunity and fair treatment in the workplace and for a nation faced with the need to make full use of the productive capacities of all its citizens. It is important, therefore, that all parties — particularly the Administration — debate the issues in 1991 on the merits rather than by slogans calculated to achieve narrow political advantage. On the merits, the Bush Administration's position to date on the Civil Rights Act raises extremely troubling concerns about its overall commitment to civil rights protections.

Chapter V

Federal Civil Rights Enforcement in Elementary and Secondary Education: The Bush Administration's Record So Far

by Elise J. Rabekoff

I. Introduction

In its 1988 Report, the Citizens' Commission on Civil Rights documented the Reagan Administration's record of enforcing civil rights laws affecting elementary and secondary education. The Report found that, under the Reagan Administration, federal civil rights enforcement in education had deteriorated dramatically. During the Reagan years, both the Civil Rights Division of the Department of Justice ("the Division") and the Department of Education's Office of Civil Rights ("OCR"), failed to pursue — indeed, affirmatively abandoned — remedies for enforcing the civil rights laws.[1]

This had particularly ominous consequences because the Division and OCR are the federal agencies primarily responsible for enforcing civil rights laws concerning elementary and secondary schools. As such, they are charged with ensuring equality of opportunity in what is "perhaps the most important function of state and local governments" and what surely is government's primary means of helping minority and disadvantaged children "to succeed in life."[2] The Division and OCR were thus intended to be the front-line federal agencies in the battles to desegregate schools, to eradicate barriers that impair educational opportunities for students with handicaps or with limited proficiency in English, and to provide girls with the greater educational choices traditionally available to boys. And it is precisely in these essential areas that both the Division and OCR notably failed to remedy discrimination during the Reagan years.

The Division's record during the Reagan Administration is simply summarized. Despite the multitude of statistical reports showing the persistence of school segregation and the continued inequality of educational opportunity,[3] and in contrast to its more vigorous record in the pre-Reagan years,[4] the Division filed only four new suits challenging segregation or other denials of educational opportunities.[5] It took no enforcement actions at all in such critical areas as metropolitan desegregation; indeed, it opposed interdistrict relief in several cases and abandoned earlier support for metropolitan-wide remedies in others.[6] Similarly, it refused to seek systemwide relief in desegregation cases, and instead advocated restriction of court-imposed remedies only to the particular schools before the court.[7]

The Division actively opposed any desegregation remedy that relied on mandatory student reassignment plans (better known as busing) or on any court-supervised consent decree or injunction.[8] Instead, it took the position that a school district's good-faith implementation of a desegregation plan, even if ineffective, was sufficient to end court supervision of a school system that had intentionally discriminated on the basis of race.[9] And the Division went further, agreeing to settle discrimination cases based on a school district's *promise* of future good-faith efforts to implement a desegregation plan, without any court or Executive Branch follow-up enforcement efforts.[10]

OCR similarly failed to pursue effective remedies for discrimination and similarly abandoned proven tools for enforcing the civil rights laws. OCR failed to process discrimination complaints against individual school districts and institutions in the timely manner demanded by court order and, in order to appear to meet mandatory timeframes, resorted to a scheme to backdate documents and to persuade complainants to drop discrimination complaints.[11] It adopted a policy of not initiating reviews for compliance with civil rights laws in districts subject to court- or OCR-approved desegregation plans — effectively exempting districts with a record of discrimination from OCR monitoring.[12] Like the Civil Rights Division, OCR relied on school district's promises of good faith and settled discrimination complaints with "letters of findings" indicating that civil rights violations had been corrected based on nothing more than the district's assurances.[13] And both OCR and the Department of Education as a whole failed to enforce Title IX, which mandates sex equality in schools that receive federal assistance, and failed to take steps to improve the educational achievement and to protect the civil rights of language-minority students.[14]

Halfway through its term, the Bush Administration's record differs in certain respects from the dismal record of the Reagan years. Most notably, in contrast to the Reagan Administration, the Bush Administration publicly proclaims the value of federal civil rights enforcement; the rhetoric of

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Bush Administration officials, coupled with some of the policy statements unveiled so far, suggests that the Administration could potentially improve civil rights enforcement in elementary and secondary schools.

Some of the policy changes effected by the Administration match the promises in the Administration's words. For instance, the Justice Department has retreated, at least in part, from the Reagan-era efforts to end court control over school districts with a record of complying with court decrees imposed to remedy segregation. Indeed, and in contrast to the aggressive Justice Department actions during the Reagan years, the Department has publicly affirmed that it has no current intention of encouraging school boards to seek an end to court-ordered desegregation plans.[15] OCR, too, has improved somewhat upon its record during the Reagan era. For the first time in eight years, OCR has terminated a school district's federal funding because of failure to comply with the requirements of the civil rights laws. And it has unveiled an ambitious "enforcement strategy" that appears to target a variety of serious problems of discrimination that had been left to fester during the Reagan years.[16]

These achievements may promise additional changes during the remainder of the Administration's term. But so far, the promising rhetoric is largely empty: there have been few concrete policy initiatives, and little actual enforcement activity, that would translate the Administration's rhetoric into improved protection of the rights of minorities.

The Administration has failed to act on most of the recommendations detailed in the Commission's 1988 Report, and it has affirmatively rejected others. Despite President Bush's oft-stated desire to be the "education President," and despite the education goals the Administration announced at the National Governors' Association meeting in Charlottesville in 1989,[17] actions to close the gap in minority school achievement continue to lag.[18] Indeed, those education goals ignored minorities, students with disabilities, and students with limited proficiency in English, who could find themselves even further behind their peers without attention to their particular needs and without proper enforcement of the laws against discrimination. Similarly, promises notwithstanding, the Administration failed to request, and Congress failed to approve, adequate funding for education programs, including programs for language-minority students and programs essential for monitoring compliance with civil rights laws. Both OCR and the Civil Rights Division continue to argue in favor of reliance on good-faith efforts by schools to enforce civil rights laws, rather than on court supervision of proven offenders.[19]

At the same time as the Bush Administration is failing to match its enforcement actions to its rhetoric, it is proposing or endorsing a number of educational "initiatives" with potentially harmful consequences for the civil rights of minority students. Most notably, OCR's new policies concerning scholarships for minority students suggest — in utter contrast to the Administration's words — a hostility to desegregation that could emerge in other education policies as well.[20] But the minority scholarship proposals, while the most widely publicized, are not the only troubling initiatives the Administration has adopted. It has, for instance, wholeheartedly endorsed parental "choice" plans that would permit students to attend particular schools of their own choosing, regardless of the effects such plans may have on the racial balance of the district's schools. Similarly, after endorsing a Milwaukee, Wisconsin pilot plan to permit up to 2,500 students to choose between public and state-subsidized private nonsectarian schools, the Administration issued an opinion that the private schools would not have to comply with the requirements of the Education for the Handicapped Act and would not have to make significant accommodations to disabled students — effectively barring many disabled students from the pilot plan and suggesting that the rights of those students could be adversely affected by any "choice" plan that extends to important issues, such as whether schools set aside for black males or minorities generally violate protections against sex and race discrimination, are looming on the horizon that the Bush Administration will face in the next two years.

The remainder of this chapter details promises, particular improvements, and shortcomings of the Bush Administration's record to date. The first section addresses the activities of the Civil Rights Division, and in particular considers its litigation posture and record of activity in civil rights enforcement cases. The second section analyzes the activities of OCR and the Department of Education generally, both with respect to OCR's enforcement activities and the Department's efforts concerning sex discrimination, discrimination against the handicapped, and assistance to language-minority students.

II. The Enforcement Efforts of the Civil Rights Division

The 1988 Citizens' Commission Report documents the Reagan-era Civil Rights Division's virtual abandonment of any role in enforcing the civil rights of students in elementary and secondary schools. In response, the Report recommended, *inter alia*, more vigorous investigation and enforcement efforts, return to prior Division policy of urging adoption of any remedy appropriately tailored to correcting the violation at issue, renewed attention to the requirements of desegregation, and renewed dedication to enforcing desegregation orders.[21]

It may be too early to assess the course the Division will chart over the full Bush term. To date, the Division, in conjunction with the Solicitor General's office, has broken away from some — but not all — of the Reagan-era policies. It maintains that it is "involved" in nearly 500 school desegregation cases,[22] but this involvement is largely inactive. Where the Division has assumed an active role, however, its efforts have been mixed.

A. THE ISSUE OF “UNITARY STATUS” AND THE TERMINATION OF DESEGREGATION DECREES

Under *Green* v. *County School Board*, a court that has found illegal school segregation retains jurisdiction over the school district at least until the district has fully desegregated and achieved the objective of “unitary status” — *i.e.*, full compliance with the Constitution’s equal protection mandate.[23] President Reagan’s Assistant Attorney General for Civil Rights, William Bradford Reynolds, actively encouraged such court-supervised school districts to seek a declaration of “unitary status” and an end to court oversight. Indeed, the Department of Justice went further, and itself sought to terminate court decrees in suits that the Division had originally filed.[24]

The Bush Administration claims to have abandoned the policy of seeking declarations of unitary status. It also claims that it has not joined in a school system’s request for such a declaration, and that it has consistently argued against seeking a declaration of unitariness when asked for an opinion on the issue by a state.[25] If true, this would be fully in keeping with our 1988 recommendations. Similarly, the positions articulated by the Solicitor General in *Board of Education* v. *Dowell* also demonstrate movement away from the Reagan Administration’s uncompromising insistence on ending court supervision of historically segregated schools.

1. THE *DOWELL* CASE: BACKGROUND OF THE LITIGATION

Board of Education v. *Dowell* is the most recent phase of thirty years of litigation concerning the Oklahoma City public schools. In 1963, District Judge Luther Bohanon found that Oklahoma City had segregated its students by law;[26] after plans adopted by the School Board failed to remedy the problem, Judge Bohanon ordered the Board to adopt a particular desegregation plan.[27] In 1975, the Board asked the court to close the case and to terminate court supervision over the school system, arguing that it had “eliminated all vestiges of state imposed racial discrimination in its school system.”[28] The court concluded that the school board had operated the desegregation plan properly and granted the motion; it did not, however, terminate the injunction under which the school system was operating.

In 1985, the Board adopted a new student assignment plan in place of the plan imposed by the court in 1972. In response, plaintiffs moved to reopen the case, on grounds that the plan violated the still-live injunction and would resegregate the city’s schools. The district court rejected the plaintiffs’ claims, finding that the schools had been “unitary” since 1977 and dissolving the desegregation decree.[29] On appeal, the United States Court of Appeals for the Tenth Circuit reversed, holding that the school board had not demonstrated an adequate predicate for lifting the injunction, and that a finding of “unitariness” ends the needs for active court supervision but does not eliminate the court’s power to enforce its dormant equitable decree.[30] The Board thereupon petitioned the Supreme Court for a writ of *certiorari*, which was granted — laying the stage for what was potentially the most significant school desegregation case in a decade.

2. THE *DOWELL* CASE: THE ADMINISTRATION’S ARTICULATION OF CRITERIA FOR “UNITARY” STATUS

The Bush Administration participated in *Dowell* as an *amicus curiae*. Its position was significant: although the Administration maintained that the Court of Appeals had applied the wrong legal standard to determine whether the injunction should be dissolved, it abandoned the Reagan-era argument that the injunction could *presently* be lifted and that the Board was free to adopt the new pupil assignment plan — a plan that would result in resegregation of many Oklahoma City schools. Instead, the Bush Administration asked for a remand in order to determine whether the district court adequately found that the school system was unitary (and therefore no longer subject to court control) *and*, in connection with the remand, asked the Supreme Court to issue “guidance on what constitutes a unitary school district.”[31]

The Department’s request for “guidance” was rooted in the fact that the Supreme Court had indicated that a school district is “unitary” if it has desegregated “every facet of school operations”[32] and if it has eliminated the “vestiges” of segregation,[33] but it had not fully defined the “vestiges” that are relevant to the inquiry. Lower courts have stressed the great burden of proof borne by a party seeking to dissolve the court’s decree, and the Bush Administration agreed — in keeping with the Commission’s 1988 recommendations — that this burden is “rigorous.”[34] It also suggested that:

> three broad inquiries should inform the question of unitariness: (1) whether the district has continuously complied with the desegregation decree in good faith; (2) whether the school district has abandoned any and all acts of intentional discrimination; and (3) whether the school district has eliminated, as far as possible, the ‘vestiges’ of prior discriminatory conduct.[35]

The government’s brief elaborated on these broad criteria. First, the government argued, a finding of unitariness is appropriate only if a school system has “faithfully observe[d] the dictates of the desegregation decree over a continuous period of time,” and has shown in both length and quality of compliance an intent to eliminate the effects of segregation.[36] Next, the school system “may not adopt any new practices that discriminate among students on the basis of race.”[37]

And finally, the school system must have “eliminated the vestiges of its prior acts of discrimination.”[38] This criterion is the thorniest, as the question whether a practice is a “vestige” of school segregation is difficult to decide. The vestiges to which a court may look, the government argued, are limited to those tied closely to the school's history of segregation, such as policy and practice with regard to faculty, staff, transportation, extracurricular activities, facilities, the racial and ethnic composition of the students, faculty, and staff, and the attitudes held toward the school by the community and the administration.[39] Where those vestiges have been eradicated, the government maintained, other potential "vestiges" of discrimination lack a sufficient nexus to school segregation and should not stand in the way of a finding of unitariness.[40]

Although the government's brief suggested a more tempered attitude toward the circumstances in which relief from court decree is appropriate, it did not recognize the full effects of segregation. Instead, it would permit a finding of "unitary status" even in the face of potentially significant signs that segregation has not been eradicated.

3. THE OKLAHOMA CITY CASE: OMISSIONS FROM THE ADMINISTRATION'S SUGGESTED CRITERIA

For one, in its *Oklahoma City* brief the government argued that, if a school district has complied with a desegregation plan over a long period, a pattern of residential segregation bears too remote a relation to school segregation to block a finding that the school system is unitary.[41] Indeed, at oral argument Solicitor General Starr flatly denied that residential segregation can be a "vestige" of *de jure* school segregation "once there has been good-faith compliance with a desegregation plan" over a long period of time.[42] Not only did this position ignore the fact that residential segregation and school segregation are often linked, it essentially asked the Supreme Court to repudiate its earlier express recognition that residential segregation may in fact be related to — and a "vestige" of — a school system's prior policy.[43]

Similarly disturbing was the government's failure to recognize the importance of *re*segregation as a factor militating against a declaration of unitariness. Under the "neighborhood assignment" plan at issue in the *Dowell* case, forty percent of the African-American children will attend racially identifiable schools. Yet the Justice Department believes that this resegregation should not stand in the way of a determination that the school system is unitary — even though the Supreme Court had recognized that the very existence of racially identifiable schools can powerfully evidence the inadequacy of a desegregation plan.[44] Instead, the Department urged, a school system's good-faith compliance with desegregation orders, coupled with the fact that it had not engaged in any acts of intentional segregation since the orders were imposed, demonstrates that the racially identifiable nature of the schools cannot be termed a "vestige" of intentional segregation and should be irrelevant in determining whether the school system is "unitary."[45]

4. THE SUPREME COURT'S DECISION IN *DOWELL*

On January 15, 1991, the Supreme Court decided *Dowell* in part along lines urged by the Justice Department. The Court agreed with the Department's position that the Tenth Circuit had imposed too heavy a burden on school systems seeking an end to court supervision and it, therefore, reversed the lower court's holding that the Oklahoma City school system had to abide by the desegregation decree unless the decree had led to "'grievous wrong evoked by new and unforseen conditions.'"[46] Instead, the Court stated, dissolution of a desegregation decree is appropriate where the school system's constitutional violation has ended, as the legal justification for court intrusion into the school system's affairs then ends as well.[47]

Agreeing with the Justice Department that the lower courts had not clearly stated whether conditions merited ending the desegregation decree, the Court remanded the case for a determination "whether the [Oklahoma City School] Board had complied in good faith with the desegregation decree since it was entered, and whether the vestiges of past discrimination had been eliminated to the extent practicable."[48] The Court, however, declined the Department's invitation to issue clear guidance on when dissolution of a desegregation decree is appropriate. Indeed, it balked at defining when a school system is "unitary" or has achieved "unitary status" and instead emphasized the importance of looking behind those labels to determine whether a school district has in fact complied with the Constitution's commands.[49]

As such, *Dowell* largely reaffirmed existing law. Just as the Justice Department urged (and as earlier cases held), the Court found that a school district's good-faith compliance with previous court orders is "obviously relevant" to any evaluation of whether court supervision of the school system remains necessary.[50] Similarly, the Court reaffirmed that a school system is obligated to eliminate the "vestiges of past discrimination," and that such vestiges include — but are not limited to — student assignments and "'every facet of school operations — faculty, staff, transportation, extra-curricular activities, and facilities.'"[51] And, significantly, the Court *rejected* the Solicitor General's position that residential segregation may never be a "vestige" of former school segregation and specifically instructed the district court to make new findings of fact on whether residential segregation in Oklahoma City could be viewed as a vestige of the school board's history of promoting and enforcing segregation.[52]

But much else remains unresolved by *Dowell*, as the Supreme Court appears deliberately to have evaded an opportunity to clarify either the circumstances under which a desegregation decree may be lifted or the consequences that flow from a decision to lift the decree. Instead, by imprecisely defining the relevant "vestiges" of *de jure* segregation the Court failed to address such central questions as: How closely must "vestiges" be linked to school system actions? How should the lower courts evaluate whether residential segregation is a "vestige" of segregated schools? Do "vestiges" include all the effects of now-abandoned segregative policies? Is the re-emergence of racially identifiable schools relevant to the inquiry? And, although the Court emphasized the importance of long-term, good-faith compliance with desegregation decrees (and implied, as well, that such compliance could not suffice absent elimination of the "vestiges" of segregation), it side-stepped related questions concerning the relevance of a prior history of resistance to desegregation, of what constitutes "long term" compliance, and of how "good faith" compliance should actually be measured.

But perhaps the most troubling aspect of *Dowell* is the suggestion, in its penultimate paragraph, that a school district may effectively obtain a "clean slate" once it has been released from an injunction imposing a desegregation plan. Such districts, the Court stated, of course "remain[] subject to the mandate of the Equal Protection Clause of the Fourteenth Amendment," but are entitled to have subsequent pupil-assignment and other policy decisions "evaluate[d] . . . under appropriate equal protection principles." The meaning of this statement is far from clear. It may, however, encourage school boards to believe that, once court supervision of a school district has ended, they can adopt new policies without regard to their segregative effect. If so, *Dowell* potentially represents a serious set-back to school desegregation. It is, accordingly, *recommended* that the Justice Department — which did not address this issue in its *Dowell* brief — scrutinize policies adopted by any school district declared "unitary" and thus freed from court supervision and challenge any policy or plan whose intent *or* effects stigmatize minority children or otherwise retard the goals of *Brown* v. *Board of Education*.

5. JUSTICE DEPARTMENT REACTION TO *DOWELL*

Dowell's reaffirmation that a "unitary" school system could be relieved of court supervision raised the specter of a return to the Reagan Administration's aggressive efforts to seek dismissal of court-ordered desegregation plans. This has not occurred. Instead, Assistant Attorney General for Civil Rights John R. Dunne has publicly stated that the Division does not currently plan to "look[] for cases in which to take the initiative" in seeking termination of court-ordered desegregation plans.[53] It is *recommended* that the Division continue this policy in future and that it oppose any such terminations unless *all* "vestiges" of segregation (including residential segregation) have been eliminated. It is also *recommended* that the Division oppose any plan that might result in resegregation of a school system once subject to court supervision.

B. OTHER DIVISION EFFORTS

The Division's record in other suits is spotty. It has been hampered in part because, during President Bush's tenure, the Department of Education's Office for Civil Rights has not referred a single case to the Division for enforcement.[54] Thus, because it has jurisdiction under Title IX and Section 504 via referrals only, the Division has not been able to file any sex- or disability-equity cases. Moreover, the Division has so far filed few desegregation cases on its own initiative. Indeed, some of the cases it has initiated signal a continuation of policies adopted during the Reagan years.

For instance, in December 1988, President Reagan's Assistant Attorney General for Civil Rights informed Prince George's County, Maryland that a teacher-assignment plan adopted as part of a 1971 agreement with state and local officials violated Title VII because it involuntarily transferred white teachers from their current assignments in order to promote racial balance on the staffs of formerly segregated public schools that were forced to desegregate by court order. In February, 1989, the Division sued to enjoin the policy, arguing that the involuntary teacher transfers no longer serve any desegregation-related purpose.[55] In effect, the Division argued that, even absent a declaration of unitary status for the entire school district, the court should eliminate the teacher-assignment policy because the district was "unitary" with respect to its teacher assignment practices.

The district court squarely rejected the Division's arguments, finding that faculty desegregation is an essential element of the school board's desegregation plan and that the board's choice of means to eradicate the vestiges of discrimination must be accorded "substantial discretion."[56] Moreover, the court found "avoidance of racially identifiable faculties" particularly important to desegregation plans that, like Prince George's County, rely on magnet schools, since "[t]he success of magnet programs . . . depends on parental choices which in turn may be shaped by perceptions of the characteristics of faculty."[57] Since the Bush Administration has championed the creation of magnet schools and other "choice" plans, the court's decision simultaneously points out the latent problems in creating choice plans in formerly segregated school districts and serves as an important precedent reaffirming the need to eliminate *all* vestiges of segregation that could influence parental choice.

Another example of the Division's inadequate attention to the lingering manifestations of segregation is its position in litigation concerning the Savannah, Georgia school system. There the system sought approval of a voluntary desegregation plan that relied upon magnet programs at predominantly black schools and did not provide for any classroom mixing between magnet and non-magnet students. The Division was not troubled by the in-classroom segregation, arguing only that some mixing, at lunch or in gym classes, should be required. The position ignored the educational benefits that have been associated with desegregation. (Even this limited position was rejected by the 11th Circuit, which upheld the plan as approved by the district court.)[58] And the Division has failed to seek interdistrict or metropolitan-wide relief even where full desegregation would otherwise be impossible.

At the same time, the Division has initiated litigation alleging that school districts in Darlington, South Carolina and St. John the Baptist Parish, Louisiana, have failed to comply with voluntary desegregation plans. The Division is monitoring Mississippi's agreement, negotiated this year, to end inter-district transfers that permitted white students living in predominantly black school districts to transfer to a predominantly white school system. And it similarly is monitoring compliance with other voluntary desegregation agreements, after complaints that a number of school districts have failed to abide by their negotiated settlements.

Looked at most positively, the record does not demonstrate vigorous enforcement activity. Looked at from another perspective, the record combines scattered support for enforcing desegregation with inattention to — or active disregard of — the desegregation goal. In consequence, it is *recommended* that the Division reevaluate its method of deciding when to bring suit, and that it file cases whenever it determines that a school district has failed to comply with a voluntary or court-imposed desegregation plan. It is also *recommended* that the Division work with OCR and other government enforcement agencies to identify likely violations and to gather information relevant to the decision to bring suit.

III. The Enforcement Efforts of the Office for Civil Rights

Under the Reagan Administration, OCR set upon a course of "not vigorously enforc[ing] laws protecting the rights of women and minorities in education."[59] As documented in a detailed report prepared by the staff of the House Committee on Education and Labor, OCR instead encouraged complainants to drop their charges, backdated reports in order to appear to decide cases in a timely manner, largely ignored race-discrimination issues, failed to spend its entire budgetary appropriation, and closed 99% of all cases by issuing either a finding of "no violation" or a letter stating that a violation had been corrected but failing to specify the nature of the violation or any monitoring of the promised remedy.[60]

Among OCR's first important acts under the Bush Administration was preparation of a detailed response that rejected virtually all of the Committee staff's major findings.[61] Moreover, in testimony to the House Committee, Acting Assistant Secretary for Civil Rights William L. Smith claimed that the problems identified by the Committee staff were merely problems of "perception" and defended OCR's enforcement record under his tenure and that of his predecessor.[62]

Contrary to Acting Assistant Secretary Smith's assertions, OCR did not get off to a promising start under President Bush. Its enforcement and policy efforts were hampered by the Bush Administration's fifteen-month delay in naming an Assistant Secretary for Civil Rights to take charge of the office. This delay was symbolic of OCR's failure to enforce civil rights in elementary and secondary schools during the interregnum: the stark fact is that under the Bush Administration OCR has not referred a single case for enforcement to the Department of Justice.[63]

Finally, in the spring of 1990, President Bush nominated Michael L. Williams as Assistant Secretary for Civil Rights. Assistant Secretary Williams suggested the possibility of change, as he brought a background in law enforcement to the job and a promise to be a vigorous civil rights advocate within the Administration. Mr. Williams was confirmed on June 28, 1990, and thus it is far too early to assess whether OCR will in fact resume its role protecting civil rights during his tenure. So far, he has issued some encouraging statements and a broadly drawn enforcement strategy that, if fully implemented, would expand OCR's enforcement role.[64] But he has also been in the forefront of the efforts to dismantle minority scholarship programs *and* he has made public statements that suggest at least skepticism about — if not hostility toward — desegregation efforts.[65] Thus whether OCR will in fact improve upon its current record of inattention to civil rights enforcement is very much an open question.

A. COMPLAINTS AND COMPLIANCE REVIEWS

OCR is required "to investigate complaints of discrimination and [to] conduct broad reviews in areas where discrimination may be a systemic problem."[66] Accordingly, OCR must investigate complaints from individuals who believe they have faced discrimination by schools or school districts. In addition, OCR initiates compliance reviews to examine additional areas of discrimination and to investigate possible systemic problems that may not be revealed by privately filed complaints.

The Citizens' Commission's 1988 Report found many shortcomings in the complaint and compliance-review system. The Commission recommended (i) that OCR adopt new guidelines and monitoring procedures to avoid manipulating complaint processing to create the appearance of acting on complaints in a timely fashion; (ii) that OCR seek to improve the efficiency of its complaint-processing system, and distribute policy guidelines concerning complaint investigations to regional offices and the general public; (iii) that OCR develop new strategies, such as federal-state cooperation, to help alleviate any burdens posed by the need for timely processing of complaints; (iv) that OCR revamp the methodology behind its civil rights surveys so that the surveys can become the basis for intelligent designation of compliance review sites; (v) that OCR abandon its policy of refusing to conduct compliance reviews in schools or school districts subject to desegregation plans; and (vi) that OCR focus compliance reviews on systemwide problems rather than particular, isolated programs.[67]

These recommendations remain valid. Some, but not all, are addressed in OCR's recent policy statements, which promise future study and the possibility of future change. In practice, however, the recommendations so far have been virtually unheeded.

1. COMPLAINTS AND COMPLIANCE REVIEWS IN GENERAL

Processing complaints remains OCR's "primary activity."[68] In FY 1989, OCR received 2,727 complaints, a decrease from the number received the previous year.[69] During that same year, OCR conducted only 138 compliance reviews, which are investigations initiated by OCR in response to information suggesting that a school district is not complying with the civil rights laws.[70]

Although compliance reviews could be used to investigate possible areas of discrimination that have not surfaced readily through the complaint process, OCR has focused its compliance reviews on precisely the same areas as were challenged in most complaints, apparently without considering whether other types of discrimination were escaping scrutiny because the victims failed to file complaints. Fifty-six percent of the complaints filed in FY 1989 alleged discrimination against students with disabilities, in violation of Section 504 of the Rehabilitation Act; similarly, 51 percent of the FY 1989-initiated compliance reviews addressed discrimination on the basis of handicap.[71] The result is that OCR has largely failed to investigate discriminatory treatment against other students; for instance, in FY 1989, only 17 percent of the complaints, and 15 percent of compliance reviews, concerned racial discrimination in elementary and secondary schools,[72] even though other evidence suggested that racial discrimination is a continuing problem.

Similar statistics for OCR's activity during prior years, coupled with a finding that OCR was most likely to find "no violation" in cases concerning race discrimination, led the staff of the House Committee on Education and Labor to conclude that OCR's "failure to devote adequate attention to race based complaints" violated its mandate to enforce Title VI of the Civil Rights Act of 1964.[73] OCR has denied that charge,[74] but has also stated that it was "unable" to perform more Title VI compliance reviews because of the staff demands required to service the large number of complaints filed each year.[75]

In light of the controversy surrounding OCR's enforcement record, it is *recommended* that OCR monitor staff treatment of Title VI complaints and provide policy guidance and technical training to reinforce staff commitment to enforcing the laws against race discrimination. It is further *recommended* that OCR use the compliance review process as a means of targeting types of discrimination that require enforcement efforts and are not adequately addressed through complaints. Although OCR has professed an intention to target the compliance review process on these other areas of discrimination,[76] its efforts may be hampered in this regard because it has not released a civil rights survey, traditionally the method for identifying districts in which compliance reviews would be appropriate, since 1986. Accordingly, it is also *recommended* that OCR return to its former practice of comprehensive biannual civil rights surveys and rely on those surveys for purposes of identifying compliance review sites.

2. THE *ADAMS* TIMEFRAMES

In 1970, a group of plaintiffs filed suit charging the Secretary of Health, Education and Welfare and the Director of the Office for Civil Rights with violating Title VI and the Constitution by failing to initiate investigations, by delaying investigations that were in progress, and by failing to seek funding cut-offs when schools or school districts were found to have violated Title VI.[77] In 1973, the U.S. Court of Appeals for the District of Columbia Circuit, sitting *en banc*, unanimously affirmed a district court decision holding that HEW had failed to comply with Title VI's statutory requirements, that the agency was affirmatively obligated to undertake enforcement actions when voluntary compliance efforts failed, and that the agency would be obliged to follow specific time frames in its enforcement cases.[78]

After additional litigation leading to court imposition of timeframes for OCR's processing of Title VI complaints, as well as other relief, OCR entered into a consent degree with the *Adams* plaintiffs in 1977 that adopted the previously ordered timeframes without significant change. Although OCR's record of meeting the timeframes actually appeared to improve during the 1980s, those seeming improvements may well have stemmed from "new and innovative methods" for circumventing the time limits on OCR's action.[79] And, despite this apparent improvement, OCR still failed to comply with the timeframes during both the Reagan and Bush years; indeed, the average age of complaints pending at the end of FY 1989 was 57 percent higher than the average age of complaints pending at the close of FY 1988.[80] Even more alarming was OCR's misuse of the timeframes: the House Staff Report found that OCR had artificially compressed the timeframes and thereby pressured staff to resolve complaints without adequate investigation or negotiation.[81]

After a number of procedural skirmishes and unsuccessful OCR attempts to vacate the consent decree, the district court dismissed the *Adams* suit for lack of standing in 1987. OCR then announced that it would voluntarily comply with the timeframes while the district court's decision was being reviewed by the Court of Appeals. In July 1989, the Court of Appeals found that plaintiffs did indeed have standing,[82] but in June 1990 it affirmed the district court's dismissal, (i) holding that the plaintiffs no longer had a cognizable cause of action against OCR and (ii) suggesting that long-term judicial oversight of OCR enforcement efforts would seldom be appropriate.[83]

OCR has since announced that it will no longer follow the *Adams* timeframes. While OCR should have flexibility to devote sufficient time and resources to complicated meritorious investigations — flexibility that, OCR's contrary claims notwithstanding, the *Adams* timeframes permitted[84] — OCR's record of delay suggests that complainants would still benefit from required resolution of their charges by a time certain. Despite the end of the *Adams* litigation, and despite OCR's history of misusing the timeframes, it is *recommended* that OCR adopt a timetable for adequate and prompt resolution of compliance reviews and complaints. OCR should develop this policy in consultation with the *Adams* plaintiffs and their counsel, who have had long experience in monitoring OCR's activities and in analyzing the time necessary for complete investigation and resolution of each stage of a compliance review or complaint investigation.

B. OCR'S ENFORCEMENT METHODS

1. REFERRALS TO THE DEPARTMENT OF JUSTICE

While OCR has taken some significant enforcement actions, in general it has not insisted on effective enforcement when it has found discrimination. As noted above, OCR under the Bush Administration has not forwarded a single complaint or compliance review for enforcement by the Department of Justice. As OCR is unable to prosecute civil rights violators itself, this failure to involve the Department of Justice when a violation has been discovered ignores a central enforcement tool. It is, accordingly, *recommended* that OCR coordinate its activities with the Department of Justice, regularly report to the Civil Rights Division on the number, nature, and significance of violations found, and again seek prosecution and civil judicial remedies upon discovering a serious violation or a repeat violation.

2. FUNDING TERMINATION

Another potent enforcement tool is OCR's ability to terminate a school district's federal funds because of a civil rights violation (except in cases involving busing). In the pre-Reagan years, OCR's willingness to defer or terminate funding (and to threaten such terminations) caused many school districts to comply with desegregation requirements. For the first time since 1982, OCR has made use of this important power, terminating the federal funding available to the DeKalb County, Georgia school system.[85] This resulted from the school system's refusal to comply with regulations requiring it to provide OCR with access to records in order to investigate complaints concerning placement of handicapped children. The school system took the position that the regulations, issued under Section 504, were inapplicable and invalid because the Education for the Handicapped Act, and not Section 504, provides the means for challenging the placement of disabled students. Were that argument to succeed, enforcement of the civil rights of disabled students would be seriously impaired, as the Education for the Handicapped Act does not provide enforcement procedures comparable to those available under Section 504.

The school system continued to deny OCR access even after an administrative decision compelling them to obey the regulatory requirement to release information about their treatment of the handicapped. In result, in September 1990, OCR cut off direct funding to DeKalb County, Georgia and also barred the Georgia Department of Education from disbursing any federal funds to the county.

The DeKalb County school district has since filed suit challenging both the administrative decision and the funding cut-off. On September 20, 1990, U.S. District Judge Louis F. Oberdorfer denied the school district's motion for a temporary restraining order to enjoin the fund cut-off.[86] The case has since been transferred, upon OCR's motion, to the 11th Circuit,[87] where it remains pending on appeal.

The federal funding cut-off is a positive signal that the Department of Education intends to maintain its traditional position that the rights of disabled students may be enforced through Section 504, and that recipients of federal aid must attend to federal non-discrimination requirements. Nonetheless, it is significant that the cut-off was imposed in response to a challenge to OCR's authority, rather than to an actual finding of discrimination. Accordingly, it is *recommended* that the Department, in conjunction with the Department of Justice, initiate fund termination proceedings in other appropriate cases, including cases that center on actual violations of civil rights laws, and seek such cut-offs whenever an appropriate means of securing compliance with non-discrimination laws.

Other OCR actions contrast with its encouraging decision to terminate federal funding because of Georgia's non-compliance with the civil rights laws. In 1987, OCR approved the Palm Beach, Florida school district's application for a $3.4 million grant for magnet schools, even though OCR was simultaneously investigating discrimination complaints against the district and the regional office had recommended that the district be declared ineligible for such funding.[88] The Bush Administration has defended the grant to the Palm Beach School District because there was no finding of violation when the grant was made; nonetheless, there *still* was no finding — one way or the other — by the end of 1989, and the grant remained in place at that time.[89]

The Palm Beach story exemplifies the hazards of OCR's policy, as well as its failure to resolve complaints in a timely manner. It also suggests that OCR has abandoned the once-common practice of deferring grants and other school system funding until investigation into allegations of discriminatory practices has been resolved. Accordingly, it is *recommended* that OCR, in coordination with other appropriate divisions in the Department of Education, once again defer grant awards from school districts that are the subjects of ongoing investigations into possible discriminatory practices. When there is reason to believe that a complaint has merit, OCR should not permit the defending school district to receive additional federal funding and participate in federal grant programs. Certainly OCR should not allow such school districts to enjoy the fruits of the federal grant program during the lengthy period of time apparently required by OCR to resolve complaints.

3. "VIOLATIONS-CORRECTED" LETTERS OF FINDINGS

Other OCR policies are equally discouraging. Since 1984, OCR has issued "letters of findings" informing school districts that their civil rights violations had been corrected, even though OCR's only "evidence" of correction is the districts' stated good-faith intention to remedy the violations.[90] Since these letters are issued in the absence of detailed findings of fact and conclusions of law to inform the recipient of the precise nature of the violation, they do not provide notice of the exact violation or a means of enforcing the promised remedy. Moreover, the letters do not insist on any short- or long-term monitoring of the school district's professed intention to remedy its violation of the law.

This was among the most controversial policies OCR adopted during the Reagan years, primarily because of the lack of specific guidance to violators and the total failure to provide for monitoring or other enforcement to determine whether the school district was in fact complying with the law. As expressed in testimony to the House Committee on Education and Labor,

> "[n]egotiating and securing the promise of remedial action *before* conclusions of law and fact are formally issued undercuts OCR's credibility to enforce the law, requires far more monitoring to determine whether the promised remedy has been implemented, and if the recipient defaults on the corrective action, necessitates a repeat investigation, repeat negotiations, and a second (and sometimes third) violation-corrected LOF. With recalcitrant recipients, OCR has to reestablish its case and issue a LOF setting forth the violation (assuming no political or ideological objection in Washington) before proceeding to the next enforcement step, a Notice of Opportunity for Hearing."[91]

Notwithstanding the criticism, the Bush Administration has adhered to the policy of issuing "violations-corrected" letters of finding, without findings of fact and conclusions of law detailing the violations and without a provision for monitoring and enforcement. Both Assistant Secretary Williams and his predecessor, Acting Assistant Secretary Smith, have publicly stressed the flexibility and efficiency of the remedy as a means of obtaining voluntary compliance with civil rights laws.[92] To its credit, however, OCR's newly unveiled enforcement strategy notes that violation-corrected letters of findings must "always be sufficient to correct the violation and of sufficient specificity to enable OCR to monitor their implementation, and promises that during FY 1991 OCR will issue "additional guidance on the standards required for an acceptable pre-LOF corrective action plan."[93]

It is *recommended* that OCR's promised "additional guidance" contain provisions that substantially restructure current policy concerning violations-corrected letters of findings. OCR should abandon its current policy of issuing a letter simply stating that a violation has been "corrected." Where OCR is able to obtain voluntary compliance prior to a formal hearing, it should issue a letter of finding (i) that spells out the factual and legal predicate for the finding of violation, and (ii) that identifies a monitoring and enforcement schedule that OCR will follow in order to ensure that violator complies with the voluntary settlement.

4. OTHER MONITORING ACTIVITIES

Along these lines, OCR must also attend to the monitoring activities in which regional offices are to engage routinely. It appears that OCR's sensitivity to the monitoring issue has increased. The new enforcement strategy states that "[m]onitoring corrective-action plans will be given a new emphasis and very high priority." It also stresses that "[m]onitoring is not an optional activity and must be carried out where compliance problems have been found."[94] Accordingly, the enforcement strategy provides that "monitoring of corrective action plans is designated a mandatory activity for all regional office personnel and has the same priority as complaint investigations. *As such, monitoring activities are not to be reduced in order to carry out any other regional activity.*"[95]

It is *recommended* that OCR issue further guidance about the nature of the monitoring activities in which regional personnel should engage, and that OCR promptly take corrective action, including referrals for enforcement by the Department of Justice and termination of federal funds, upon learning that a violation has not been corrected or that a previous violator has again failed to obey the civil rights laws.

C. OCR'S STATED ENFORCEMENT STRATEGY

On December 11, 1990, OCR released its "National Enforcement Strategy" for FY 1991 and 1992. In that strategy, OCR set out its enforcement goals for the next two fiscal years and promised "a more comprehensive and balanced enforcement strategy to supplement, and complement, OCR's complaint investigation program [and thus] enable OCR to focus its available resources on many important issues that do not usually arise through complaints and to initiate investigations of broader impact than are found in most complaint allegations."[96]

1. OCR'S STATED GOALS

OCR's self-identified "key aspects" of the enforcement strategy are:

> "1. Integrating OCR's compliance review program into a comprehensive and well-coordinated program of policy development, staff training, compliance reviews, technical assistance and policy dissemination.
>
> 2. Monitoring corrective-action plans will be given a new emphasis and very high priority. Monitoring is not an optional activity and must be carried out where compliance problems have been found. On-site monitoring will be encouraged, where needed, and complaint and compliance review investigations will be tracked through OCR's automated systems until all monitoring activities are completed. Corrective-action plans and monitoring will also be addressed as a priority through OCR's Quality Review Program.
>
> 3. Restructuring OCR to more effectively accomplish its mission. Specific organizational and staffing realignments will be carried out to increase staff resources in OCR's regional offices and to realign the geographic boundaries of some regional offices to enable them to carry out a more balanced program."[97]

Stating these broad policy goals is, of course, an important reaffirmation of OCR's potential as a primary agency for enforcement of the civil rights laws. Nonetheless, OCR's promises must be matched by concrete follow-up. Accordingly, it is *recommended* that OCR develop specific and detailed policies to implement each of these broad goals, that OCR work with its regional offices and concerned interest groups to identify particular problems and possible solutions to them, and that in the process OCR comprehensively reevaluate its compliance review, complaint, monitoring, and enforcement procedures.

2. OCR'S "HIGH PRIORITY ISSUES"

In addition to setting out goals for restructuring the agency, the enforcement strategy identifies issues that "will receive special emphasis because of a growing concern that the practices of some educational institutions severely inhibit the provision of equal educational opportunities in violation of the civil rights statutes."[98] OCR listed seven issues as "priorities" for FY 1991, all of which potentially concern elementary and secondary education:

> "1. Equal Educational Opportunities for National Origin Minority and Native-American Students Who are Limited-English Proficient,
>
> 2. Ability Grouping That Results in Segregation on the Basis of Race and National Origin;
>
> 3. Racial Harassment in Educational Institutions;
>
> 4. Responsibilities of School Systems to Provide Equal Educational Opportunities to Pregnant Students;
>
> 5. Appropriate Identification for Special Education and Related Services for Certain Student Populations; *e.g.*, "Crack Babies" and Homeless Children With Handicaps;
>
> 6. Discrimination on the Basis of Sex in Athletics Programs;
>
> 7. Discrimination on the Basis of Race in Admissions Programs and in the Provision of Financial Assistance to Undergraduate and Graduate Students."[99]

For FY 1992, OCR identified six "priority" issues, of which five potentially concern elementary and secondary schools:

> "1. Over Inclusion of Minority Students in Special Education Classes;
>
> 2. Sexual Harassment of Students;
>
> 3. Student Transfer and School Assignment Practices That Result in the Illegal Resegregation of Minority Students;
>
> 4. Discrimination on the Basis of Race and National Origin in Student Discipline;
>
> 5. Equal Opportunities for Minorities and Women to Participate in Math and Science Courses."[100]

OCR promises to develop "policy documents" and enforcement strategies concerning each of these "priority issues."[101] It is *recommended* that OCR involve the regional offices and all potentially interested parties in developing these documents, that each statement include specific and detailed monitoring and enforcement strategies, and that OCR publicize these policies so that all potentially affected parties are fully aware of both the policies and the penalties for violating them.

D. OCR'S POLICY STATEMENTS

Here again, OCR's professed intentions suggest that it may resume an active role in civil rights enforcement. On October 15, 1990, OCR issued two new policy statements focusing on specific areas of discrimination that had not previously received departmental attention (and that are among the FY 1991 "priority issues"). OCR first informed the Chief State School Officers that Section 504 requires recipients of federal education aid to identify and locate every qualified handicapped person in the recipient's jurisdiction who is not receiving a public education, and that this requirement applies to any disabled homeless children and any disabled children of drug-addicted mothers.[102] In a separate letter to the Chief State School Officers, OCR also made clear that Title IX bars discrimination based on a student's pregnancy, including discrimination in the provision of health insurance or insurance benefits, and that "pregnancy must be treated as a justification for a student's leave of absence for whatever period of time the student's physician finds is medically necessary, if the [school district] does not maintain a leave policy for which a pregnant student is qualified."[103]

These policy statements are important affirmations of the law, but they notably fail to provide specific guidance for school districts, just as they fail to assure monitoring or other enforcement activity. The statement on homeless children and the children of drug-addicted parents was not accompanied by any guidance as to strategies for identifying such children or how states and school districts should develop their own policies to cover these populations. Nor did the statement promise any OCR enforcement efforts to ensure that the rights of handicapped homeless children and children of drug-addicted parents would be protected. The statement on pregnant students similarly stopped short of providing concrete policy guidance and monitoring/ enforcement guarantees.

Accordingly, it is *recommended* that OCR follow up these policy statements with data-collection efforts to estimate the size of the populations covered, that OCR develop specific policy guidance for state and school district implementation of these broad policy statements, provide technical assistance to the extent necessary, and embark on a program to monitor compliance with these newly articulated directives. It is further *recommended* that OCR follow up its policy statements with additional statements detailing these monitoring efforts and the enforcement strategies OCR will pursue if it finds a violation.

In addition, OCR has promised to release policy statements concerning attention-deficit disorder, in-school segregation, and the civil rights responsibilities of school systems and state agencies that are developing or implementing educational choice plans. Just as recommended for the policy statements already issued, it is *recommended* that any new policy statement include a data-collection component so that OCR can identify the population affected by the policies and the actual effect of the policies. It is also recommended that OCR work with its regional offices and with interest groups in developing these policies, and that each policy statement provide concrete implementation guidance and stated, concrete monitoring and enforcement strategies. And, in addition, it is *recommended* that OCR publicize these policy initiatives so that state and local officials, students and parents, and all other interested parties are fully aware of the policies and OCR's intent to enforce them.

In addition to the publicly issued policy statements, OCR has issued internal guidance concerning interpretations of civil rights statutes.[104] These unpublished statements have significant policy implications, as they clarify some of the issues that OCR does or does not believe constitute discrimination under the civil rights laws. In result, it is *recommended* that OCR publicize these statements and make them publicly available.

E. EDUCATIONAL OPPORTUNITIES FOR LANGUAGE MINORITY STUDENTS

The problems of students with limited proficiency in English remain acute. Indeed, since the 1988 Report, the problems, if anything, are more pressing. Strikingly, the Department of Education has made little progress in this area since the 1988 Report, although recent policy statements suggest that OCR may devote more attention and resources to the problems of the language-minority population.

1. THE PROBLEM OF DATA COLLECTION

One seemingly intractable problem is the difficulty of obtaining an accurate estimate of the number of school-age children whose first language is not English and who have limited proficiency in English. The Department of Education, which is charged with estimating the limited-English-proficiency ("LEP") population, has not released an estimate of the number of LEP students since 1986. That calculation, which reduced the Department's previous estimates by nearly two-thirds, was mired in controversy over the Department's decision to reduce the standards of English proficiency and over other methodological issues, and is widely regarded as an inaccurate assessment of the actual size of the LEP population.[105] Other accepted, albeit crude, estimates suggest that English is the second language for one-sixth of all elementary and secondary students, and that half that number — one-twelfth of all American students — have limited proficiency in English.[106] In California, home to more than 10 percent of America's elementary and secondary students, one of every four students speaks a language other than English at home, and one of every six students was born outside the United States.[107] Moreover, Congress has expressly found that "[i]n the Nation's 2 largest school districts, limited-English students make up almost half of all students initially entering school at the kindergarten level."[108]

These snapshots do not provide a full picture of the limited-English-proficiency population. The failure to develop an accurate data base should itself be a matter of national concern, as appropriate policies cannot be developed absent acceptable statistical measures of the size of the language-minority population. In result, it is again *recommended* that the Department of Education improve its estimates and projections of the LEP population. It is also *recommended* that the Department work with individuals from language-minority communities, and with demographers specially trained to analyze language-minority populations, in order to gather and analyze the statistical data.

2. THE LACK OF ADEQUATE FUNDING

The Department's continuing failure to develop an accurate estimate of the LEP population is indicative of its continuing failures in other areas of concern to language-minority students. Since 1968, when the Bilingual Education Act was signed into law, the federal government's primary commitment to bilingual education has been monetary. Yet the funding for bilingual education programs has shrunk as the LEP population has mushroomed. In FY 1980, Congress appropriated $167 million under the Bilingual Education Act. In FY 1990, Congress appropriated $157.8 million for bilingual education grants, teacher training and support services. Congress also appropriated another $30 million for emergency aid for refugees under a refugee assistance program that has since expired.

In result, the number of LEP students who receive assistance from federally funded bilingual education programs has fallen since 1980. In FY 1981, more than 269,000 students participated in Title VI programs. In FY 1990, despite the substantial growth in the needy population, only 254,000 students were participating in those programs. These relatively small numbers assume special significance in light of the fact that available funds support only one-third of the fundable grant proposals submitted each year. The result is that a substantial portion of the LEP student population may not be receiving the educational assistance it needs.

Accordingly, it is again *recommended* that the Department of Education, together with the Congress, make adequate funding for LEP students a top priority. In the near-term, the Department should seek to restore funding to inflation-adjusted FY 1980-81 levels. The Department should also develop a strategy for long-term assessment of the needs of the LEP population and the funding level necessary to meet them over the long term.

3. THE PROBLEMS OF MISPLACEMENT AND DISCRIMINATORY TREATMENT

One of the most disturbing recent trends concerning the LEP population is the placement of LEP students in special-education classes. As Congress expressed in the 1990 amendments to the Education for the Handicapped Act:

> "Studies have documented apparent discrepancies in the levels of referral and placement of limited-English proficient children in special education. The Department of Education has found that services for limited-English proficient students often do not respond primarily to the pupil's academic needs. These trends pose special challenges for special education in the referral, assessment, and services for our Nation's students from non-English language backgrounds."[109]

In his response to written questions submitted at his confirmation hearings, Assistant Secretary Williams stated that "[m]islabelling students or misplacing them in special education classes based on their limited proficiency in English would violate Title VI as well as Section 504 of the Rehabilitation Act of 1973. Thus, OCR should carefully examine all allegations of mislabelling or misplacement."[110] Williams has since publicly stated that OCR is studying the problem of over-inclusion of all minorities in special education and will conduct "comprehensive compliance reviews" once investigative policies have been developed.[111]

OCR's new recognition of the problem of misplacement, and its stated commitment to treating misplacement as violative of both Title VI and Section 504, is potentially significant, as is the promise of future compliance reviews. It is *recommended* that OCR devote substantial effort to developing standards for such compliance reviews quickly, that it aggressively pursue compliance reviews wherever warranted, and that it refer all violations found to the Department of Justice for appropriate legal action. It is also *recommended* that the Department devote significant technical and training efforts to helping school districts overcome the problems of misplacement of LEP students in special-education classes. It is further *recommended* that the Department seek funding for special-education classes geared toward LEP students so that LEP students who are properly placed in special-education classes may obtain an education appropriate to both their handicap and their language-minority problems.

4. OCR'S POLICYMAKING AND ENFORCEMENT EFFORTS

The plight of misplaced LEP students strongly suggests that OCR has to date been inattentive to the LEP population. This is made even more apparent by OCR's most recent Annual Report to Congress summarizing its compliance and enforcement activities. That sixty-three page document, covering OCR's FY 1990 activities, does not mention *any* compliance or enforcement activity focused on an LEP student, thereby indicating the relative lack of importance OCR publicly ascribed to the LEP population. Yet it is not the case that the LEP population is free from discrimination: numerous instances of in-school discrimination against LEP students have been recorded and brought to OCR's attention.[112] And, in fact, during 1989, OCR conducted at least sixteen compliance reviews ("*Lau* reviews") to determine whether the school districts at issue were complying with the requirements of Title VI concerning language-minority students.[113]

While sixteen spot reviews are a demonstrably inadequate means of assessing discrimination against an estimated one-twelfth of all elementary and secondary students, there are other signs that OCR is refocusing attention on the problems of the LEP population. OCR's FY 1991-92 National Enforcement Strategy lists as its top priority ensuring "equal educational opportunities for national origin minority and Native-American students who are limited-English proficient."[114] The LEP enforcement strategy sets out nine activities that OCR proposes to accomplish in the near term:

— developing and issuing "a definitive policy statement regarding the responsibilities of recipients under Title VI;"

— developing "investigative guidance," including model investigative plans, for regional staff to follow when investigating complaints or conducting compliance reviews concerning LEP students;

— publicizing OCR's policies to concerned groups and encouraging Title VI recipients to develop and disseminate internal policies;

— providing technical assistance to help Title VI recipients develop internal policies;

— providing OCR regional legal and supervisory staff with training and policy workshops on investigative strategies and policy issues;

— initiating a nationwide compliance review program;

— publicizing the results of key OCR investigations, including details about the issues examined, evidence gathered, findings, and any corrective action taken;

— conducting follow-up activities necessary to implement the enforcement strategy, such as monitoring corrective action plans and identifying additional compliance review or other activities that seem appropriate in light of OCR's experiences with a more aggressive enforcement program; and

— coordinating DOE resources in developing research and other programs and its technical assistance activities.[115]

This new enforcement strategy, if actually carried out, will mark a significant change in OCR's level of attention and commitment to the problems of LEP students. But the strategy, largely focused on policy and guidance, does not stress action designed to correct and monitor violations. It thus does not fully realize the promise made by Assistant Secretary Williams at his confirmation hearing, where he told the Senate Committee on Labor and Human Resources that under his leadership OCR would take an "active and aggressive role" in protecting the rights of language-minority students.[116]

Accordingly, it is *recommended* that OCR reexamine the priorities reflected in its enforcement strategy and, in keeping with Assistant Secretary Williams' statements, stress compliance reviews and enforcement at least as heavily as policy guidance. It is also *recommended* that OCR provide states and school districts with specific guidance, rather than precatory instructions, concerning methods for meeting the needs of the LEP population.

F. THE SPECIAL PROBLEMS OF STUDENTS WITH DISABILITIES AND RELATED ISSUES OF DISCRIMINATION REDRESSABLE UNDER SECTION 504

More than 4.5 million children with disabilities are being educated in programs funded under the Education for the Handicapped Act.[117] That Act was recently reauthorized, with significantly increased authorization levels and extension of the law's protection to children with autism and traumatic brain injuries.[118] The new legislation also requires the Department of Education to seek notice and comment about attention-deficit disorder ("ADD") as a first stage in analyzing whether ADD should also be included as a handicapping condition under the Act.[119] The law further establishes a new grant program geared toward assisting in proper placement of children with serious emotional disturbances.[120] And the law adds new focus to early intervention on behalf of children with disabilities and to early-childhood education for them.[121]

These changes promise expanded protections for students with disabilities. Nonetheless, there remains a significant shortage of trained special education teachers and trained personnel capable of providing disabled students with education-related services. According to the Department of Education, during school year 1985-86 there was a shortage of 27,474 special education teachers needed to fill vacancies or to replace uncertified teachers who do not meet state standards. This number may, in fact, understate the trained-personnel problem, as other estimates suggest that as many as 30 percent of persons currently practicing in the special education field do not meet minimum state standards for special education personnel. Moreover, the problem is growing: the National Center for Education Statistics reports that the number of special educators graduating from programs designed to prepare them for work with disabled students fell 35 percent during the past decade.[122]

Given this lack of qualified professionals in the special-education field, it is no wonder that school districts have been increasingly unable to identify appropriate educational placements for children with disabilities. Under the Education for the Handicapped Act, every handicapped child is entitled to a free appropriate public education in the least restrictive setting possible. This guarantee is reinforced by Section 504 of the Rehabilitation Act of 1973, as amended, which prohibits recipients of federal financial assistance from discriminating against otherwise-qualified handicapped persons on the basis of their disability.[123] Nonetheless, discrimination against students with disabilities remains a significant problem.

In the 1988 Report, the Citizens' Commission recommended, *inter alia*, that the Department of Education affirm OCR's responsibility for enforcement of Section 504 in the educational setting. As a corollary to this call for improved enforcement, the Commission also recommended substantial increases in funding for special-education programs, so that programs for persons with disabilities could appropriately expand and so that federal agencies could devote adequate attention to the problems of the disabled.[124] By its funding cut-off in response to Georgia's claim that Section 504 could not be used to enforce the rights of disabled students, see *supra*, OCR impliedly reaffirmed its commitment to enforcing Section 504's guarantees to elementary and secondary school students. The other recommendations, however, largely remain unheeded although, again, there are signs that enforcement efforts may somewhat improve.

1. COMPLAINTS AND COMPLIANCE REVIEWS

At least since FY 1981, the majority of complaints filed with OCR, and the majority of OCR-initiated compliance reviews, have alleged violations of Section 504. In FY 1989, the last year for which it has released data, OCR received 1,571 complaints alleging a violation of Section 504, amounting to 56 percent of all complaints filed.[125] During that year, OCR closed 1,517 complaints, 47 percent of all complaint closures.[126] Again during FY 1989, OCR initiated 43 compliance reviews — 51 percent of all compliance reviews begun that year at elementary and secondary institutions — to determine whether elementary and secondary schools were complying with Section 504's requirements. At the same time, OCR closed 64 such reviews, or 54 percent of all compliance-review closures concerning elementary and secondary schools.[127]

OCR's record concerning Section 504 enforcement is not, however, as bright as these statistics may appear. Fully one-third of the disability-related complaints to OCR in FY 1989 were withdrawn prior to resolution.[128] And more than two-thirds of the closures reported by OCR resulted in a finding of "no violation" or no requirement for monitored, corrective action.[129] While there may legitimately have been no violation in those cases, the statistics are fully consistent with OCR's disturbing and apparently persisting pattern of encouraging complainants to withdraw their charges and of "resolving" complaints and compliance reviews by relying on promises of changed behavior, unaccompanied by follow-up enforcement efforts by OCR or the courts. And, given OCR's failure to refer a single § 504 complaint for investigation and prosecution by the Department of Justice, its enforcement efforts must be regarded as less than comprehensive.

These enforcement efforts, in sum, may not adequately secure disabled students with the freedom from discrimination guaranteed by Section 504. Accordingly, it is *recommended* that OCR cease resolving complaints and compliance reviews without requiring follow-up monitoring efforts. It is also *recommended* that OCR focus its attention on tracking down and resolving classroom-related violations of Section 504, rather than simply focus on facilities-related problems, so that disabled students can realize the full value of the education and training provided under the Education for the Handicapped Act.

2. THE PROBLEM OF OVER-REPRESENTATION OF MINORITIES IN SPECIAL-EDUCATION CLASSES

Congress has expressly found that:

"More minority children continue to be served in special education than would be expected from the percentage of minority students in the general school population. Poor African-American children are 3.5 times more likely to be identified by their teacher as mentally retarded than their white counterpart. Although African-Americans represent 12 percent of elementary and secondary enrollments, they constitute 28 percent of total enrollments in special education."[130]

Accordingly, Congress stated, with respect to discretionary grant programs funded under the newly reauthorized Education for the Handicapped Act, "[g]reater efforts are needed to prevent the intensification of problems connected with mislabeling and high dropout rates among minority children with disabilities."[131]

Assistant Secretary Williams has himself recognized that "[n]ationwide minority children do appear to be overrepresented in special education classes."[132] Over-inclusion of minority students in special-education classes is listed as chief among OCR's stated "priority issues" for FY 1992.[133] OCR's encouraging words must, again, be accompanied by specific guidance and specific enforcement strategies designed to eliminate the problem. Thus, it is *recommended* that OCR include within these statements specific policy guidance for the states and school districts, and specific enforcement strategies to ensure that the rights of handicapped and racial minorities are fully protected, including protection against improper designation as disabled and against improper classification of actual disability.

3. THE RIGHTS OF DISABLED STUDENTS UNDER PUBLIC-PRIVATE "CHOICE" PLANS

In 1990, Milwaukee, Wisconsin adopted a plan that permits up to 2,500 elementary and secondary school students to choose between public and state-subsidized private nonsectarian education. Eligibility for the plan, which subsidizes up to $2500 of the cost of private education, is based on family income. The subsidy is paid by a state appropriation "without commingling of Federal funds."[134]

After the plan was adopted, the Wisconsin Department of Public Instruction informed Milwaukee's private, nonsectarian schools that, inter alia, participating schools would be required to certify that they will comply with Section 504's prohibition against discrimination on the basis of handicap and that they will meet special-education requirements amounting to a "free appropriate public education" for disabled students, as required under the Education for the Handicapped Act.[135]

Apparently in response to a request from certain state officials, Richard D. Komer, OCR's Deputy Assistant Secretary for Policy, examined whether the state had overstated the legal obligations that could be imposed upon private school participants in the choice plan. He concluded that the Education for the Handicapped Act does not apply to the Milwaukee Choice plan because disabled students would be privately placed by virtue of parental choice, rather than placed by a public agency's determination that the private school offered the appropriate educational placement for the child. He similarly concluded that Section 504, while applicable to the state and consequently to recipients of its funds, imposes only limited obligations on the schools participating in the choice plan and does not require the schools to provide a free appropriate public education or to make significant accommodations to disabled students who wish to attend the private school. Rather, Section 504 applies only to the extent that it bars the private schools from excluding a handicapped student "'able to participate in the program with minor adjustments in the way the program is normally offered.'"[136]

This determination is particularly significant in light of the Bush Administration's emphasis on "choice" plans that permit parents and students to identify the schools their students will attend: if, as the Komer memorandum suggests, OCR believes that parental "choice" means that disabled students will not be protected by the Education for the Handicapped Act or the more rigorous elements of Section 504, such choice plans will eliminate needed protections for students with disabilities. Already a Wisconsin judge has relied on the OCR memorandum to hold that private schools participating in the choice program are not required to provide the same services for participating disabled students as are available in public schools.[137] Moreover, because the private school participants in the "choice" program need not meet the needs of handicapped students, the plan will potentially consign students with disabilities to a public school system while all others can freely choose among the educational opportunities made available by the $2500 grant. Accordingly, it is *recommended* that OCR reexamine its views about the intersection between choice plans and the laws protecting disabled students, and in particular that OCR reevaluate the legal analysis — which was subject only to cursory internal review[138] — underlying the Komer memorandum's conclusions.

IV. Conclusion

In sum, it may be too early to assess the Bush Administration's record of enforcing the civil rights of elementary and secondary school students. Administration officials have made encouraging statements professing renewed commitment to enforcement efforts, and have taken some steps to make good on those promises. Yet the fact remains that neither the Division nor OCR has pursued the aggressive enforcement strategy necessary to transform rhetoric into reality. Only if the next two years bring concrete enforcement efforts will the Bush record markedly differ in its essentials from the record of inattention compiled during the Reagan years.

Chapter VI

Update on Sex Discrimination in Education: The Bush Record

by Ellen Vargyas

I. Introduction

Our analysis of the Reagan Administration's record regarding sex discrimination in higher education, *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* at 152-65, found that record wanting. Despite demonstrated and widespread problems of gender-bias in education — ranging from pronounced patterns of sex-segregation in vocational, technical and professional education programs to pervasive problems of sexual harassment and employment discrimination at all levels of education to endemic discrimination against girls and women in education-related athletics program — the Reagan Administration's record was characterized principally by efforts to cut back on the scope of laws prohibiting gender discrimination in education and the failure to enforce effectively the laws which existed. We concluded, "[t]he bottom line . . . is clear. The Reagan Administration 'enforcement programs' are notable primarily for their failure to enforce. And the message to victims of discrimination is equally clear. The federal government is not there to help." *Id.* at 163.

Based on our review of this record, we made the following recommendations for the then-new Bush Administration:

1. There must be public and vocal support for civil rights enforcement on the part of top Administration officials.

2. Adequate resources must be devoted to assure aggressive enforcement of the civil rights laws. More specifically, the Administration must assure adequate staff and resources to: investigate, negotiate, and conciliate complaints; bring enforcement actions; and gather, analyze, and disseminate data.

3. The Administration must assure that all agencies and departments within the government fully carry out their civil rights obligations, including the promulgation of Title IX regulations.

4. The Administration must effectively target compliance reviews, policy directives, and rulemaking activities to address not only violations of the law where enforcement activities have been undertaken in the past and where enhanced efforts are needed but also to include major emerging problem areas.

5. Working with the Congress, the Administration should act to amend the civil rights laws to: repeal the abortion amendment to the Civil Rights Restoration Act; narrow other exemptions from Title IX coverage; and strengthen the Executive Order 11246, particularly in its enforcement mechanism.

The experience of the first two years of the Bush Administration is, at best, only a marginal improvement over the confrontational anti-civil rights stance of the Reagan years. Initial promises of an administration more open to and supportive of the enhancement of civil rights have fallen under the weight of the veto of the Civil Rights Act of 1990 and the attack on minority scholarships, to give only two examples. As of this writing, none of our recommendations regarding sex-equity in higher education has been implemented or appears to be in the process of implementation. The following discussion will review the record of the Bush Administration to date in this critically important area.

II. The Bush Administration Record

A. THE OFFICE FOR CIVIL RIGHTS

Perhaps the key barometer of any Administration's commitment to the eradication of gender-discrimination in education is the leadership and support it provides to the Department of Education's Office for Civil Rights (OCR). OCR is charged with the administrative enforcement of the principal federal statute prohibiting gender discrimination in education, Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 *et seq.*[1] Title IX, which prohibits gender discrimination in all education programs and activities receiving federal financial assistance, applies, institution-wide, to the great majority of educational institutions and programs across the country.

While Title IX may be enforced privately, OCR's role remains critical to a vital Title IX. As a practical matter, administrative enforcement offers the only viable remedy for most Title IX claimants who do not have the resources to go to court. Furthermore, through its interpretations of the regulations, the guidance and technical assistance it provides to education institutions, and the compliance reviews it conducts, OCR has the potential to play a powerful role in developing and enforcing the law.

In spite of this crucial function, the Bush Administration did not nominate an Assistant Secretary for Civil Rights (the head of OCR) until the spring of 1990. Its nominee, Michael Williams, was promptly confirmed by the Senate in late June, 1990 — but this was a full year and a half into this Administration's term. Mr. Williams began his tenure on a positive note, principally by developing lines of communication to the civil rights community which had not existed for a decade. However, grave concerns were raised when he chose as his first policy initiative the highly controversial effort to eliminate minority scholarship programs. While the details of this extremely misguided initiative did not specifically address gender issues and are dealt with in other papers, two points are relevant to the questions at issue here. First, it was yet one more example of this Administration's virtually reflexive antipathy to any form of affirmative action including efforts to achieve diversity in the workplace or schoolhouse; this has serious ramifications for efforts to achieve gender-equity in education. *See, e.g.*, the discussion below regarding the President's message accompanying the signing of the Perkins Act. The fact that Mr. Williams was forced to back off somewhat from his original proposal does not alter this conclusion: the policy left intact is extremely confusing, likely at direct odds with the mandate of the Civil Rights Restoration Act and, at best, only postpones the attempt to eradicate virtually all minority scholarship programs.

Further, it is noteworthy for the fact that Mr. Williams made no effort to address — or even acknowledge — the problems presented by gender discrimination in scholarship programs. Title IX permits colleges to administer certain gender restricted scholarships established pursuant to legal instruments as long as there is overall balance in the scholarship program. OCR has not undertaken enforcement activities addressed at assuring compliance with this provision although anecdotal evidence suggests that these scholarships tilt notably toward males. Moreover, it is clear that at least two-thirds, and probably significantly more, of the hundreds of millions of athletic scholarship dollars awarded every year are intentionally restricted to young men. Despite the rhetoric in the campaign against minority scholarships OCR has done nothing to address or acknowledge this overt and widespread discrimination against women.

In addition to minority scholarships, Mr. Williams has announced six other OCR priorities for 1991. The two which address gender issues include sex discrimination in athletics and discrimination on the basis of pregnancy. While these are both important matters and appropriate priorities for OCR enforcement, there is no indication that OCR is intending to devote any new resources to eradicating discrimination in these areas. Indeed, as of mid-January, OCR had no plan either in effect or under consideration to address pregnancy discrimination. It had sent a letter to chief state school officers reminding them of the regulatory prohibition against pregnancy discrimination, but that was all.

Not only is a plan of action also lacking regarding athletics discrimination, OCR's current interpretation of Title IX's prohibition against discrimination in this area is deficient. Its recently issued investigator's manual addressing discrimination in education-related competitive athletics programs appears to protect many practices which are likely Title IX violations. The Manual, which was issued without any consultation with outside persons or groups, reflects a surprising lack of familiarity with and understanding of many of the pressing issues in this area. A detailed critique of this Manual has been presented to OCR by the National Coalition for Women and Girls in Education with a request that it be withdrawn and revised. The request is pending. Until this issue is addressed, it is unlikely that OCR will make any serious progress in the effort to eliminate gender discrimination in education- related athletics.

Also of substantial concern, virtually nothing at all has been done to address or acknowledge the many important gender-discrimination issues in "non-priority" areas. No efforts, either through policy memoranda, targeted compliance reviews, technical assistance, or other available mechanisms, have been undertaken to develop the meaning of and enforce Title IX regarding, for example:

–widespread sex segregation in vocational programs at all levels of education;

– the limited access of girls and women to math, science, computer, engineering and related programs;

– the broad use of standardized tests reflecting gender-differentials in scoring, ranging from college admissions tests to tests routinely used in connection with vocational education programs;[2]

– the availability of child care for students and potential students who are low-income mothers;

– the particular needs of the growing numbers of older women returning to school.

In addition to the serious problems presented at the leadership and policy levels, OCR continues to suffer from a shortage of resources which has seriously curtailed its activities. OCR's FY 1990 budget was virtually the same as its FY 1985 budget was; given inflation this represented a substantial decrease in real spending power.[3] Its FY 1991 budget of $48,404,600[4] represents a long overdue increase but the funds are still insufficient to do the job. While raw numbers of complaints and compliance reviews processed are not the only — or necessarily the best — measure of OCR's performance, these numbers are, nonetheless, telling. OCR conducted only approximately thirty-two compliance reviews in FY 1990.[5] This is down dramatically from the 247 compliance reviews it conducted only two years ago.[6] Furthermore, in FY 1990 OCR drastically reduced staff travel to investigate complaints, conduct compliance reviews, and provide technical assistance to institutions. Without the ability of its staff to undertake these activities in person, OCR's effectiveness was severely diminished.

OCR's budgetary problems have also resulted in reduced staff levels which in turn have contributed to its decreased activities. OCR did not hire its full complement of allotted staff in any year from FY 1985 through FY 1989. Actual staff fell from 913 full time equivalents in FY 1985 to only 789 in FY 1989. Final FY 1990 figures showed FTE usage of 815,[8] which represents an improvement, but is still significantly below 1985 levels. The result of all these factors is that OCR has only a minimal presence in the education community. The message has been all too clear: civil rights enforcement is not a priority.

In sum, OCR's performance over the past two years has not, under any analysis, even begun to achieve the goals we set forth in *One Nation, Indivisible: The Civil Rights Challenge for the 1990s*. While we continue to hope that a positive contribution toward much-needed civil rights enforcement will be forthcoming, the existing record is not promising.

B. VOCATIONAL EDUCATION: THE PERKINS ACT

In an action which could seriously impede the effort to eradicate the gender bias which pervades vocational education programs, President Bush chose to directly attack the limited sex-equity set asides which Congress enacted as part of the 1990 reauthorization of the Carl D. Perkins Vocational Education Act. While he signed the Act into law, in his accompanying statement the President raised "constitutional" objections to the legislation's set-aside of funds to achieve sex-equity in vocational education programs, complaining that "such activities would, on their face, discriminate on the basis of gender."[9]

This statement ignores the record, amply developed through congressional hearings and findings, of sex-discrimination which permeates vocational education programs. This record shows that these programs have long been marked by extreme patterns of sex-segregation with females concentrated overwhelmingly in traditionally female — and traditionally low-paying — fields. Moreover, the record strongly supports Congress' view that without mandatory set-asides for programs to achieve sex-equity, little would be done to enhance the opportunities of girls and women in vocational education. Fairly viewed, the legislation and its history more than satisfy current legal requirements regarding the showing which must be made by Congress in order to justify programs designed to aid the victims of discrimination.

The President's disregard of this record along with his virtual invitation to the states either to challenge or simply not comply with the full intent of the set-asides enacted by Congress is extremely troubling. Congressional supporters of the Act have urged the President to refrain from discouraging state implementation of the sex equity programs; the ultimate path which the Administration will take is not yet clear. Nonetheless, the President's statement reinforces his Administration's antipathy to programs seeking to eradicate the effects of past discrimination, regardless of how carefully supported and targeted they may be.

C. THE CIVIL RIGHTS DIVISION

The Civil Rights Division of the Department of Justice has taken on an important case in its challenge, under Title IV of the Civil Rights Act of 1964 and the Fourteenth Amendment to the United States Constitution, to the Virginia Military Institute's all male admissions policy in *United States of America v. Commonwealth of Virginia et al.* Title IV gives the United States standing to file suit where a public college, such as VMI, has denied admission to a person or persons on the basis of race, color, religion, sex or national origin and such person or persons have filed a written complaint with the Attorney General 42 U.S.C. § 2000c-6.[10] As of the writing of this paper, the case was in discovery with a trial date set for April, 1991.

According to the Department of Justice, a similar case against the Citadel, a public, all male military institute in South Carolina is under consideration although it has not been filed. However, also according to the Department of Justice, no other gender discrimination in education cases have been brought and none are under consideration. It must be a critical priority to expand the Department of Justice's enforcement role in this area.

D. WOMEN'S EDUCATIONAL EQUITY ACT PROGRAM

The Women's Educational Equity Act (WEEA) is the only federal program which provides funds to promote educational equity for women and girls, particularly those who suffer from multiple discrimination, bias or stereotyping, and to provide assistance to enable educational agencies and institutions to meet the requirements of Title IX. WEEA was funded to a level as high as $10 million in 1980. It received only $2.1 million in FY 1990 and $1.995 million in FY 1991. The practical result is that this Administration has no meaningful role in the development and dissemination of the tools necessary to achieve sex-equity in education. This is particularly troubling given the Administration's effort to represent education as one of its highest priorities.

E. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

The Department of Labor's Office of Federal Contract Compliance Programs (OFCCP) has responsibility for enforcing Executive Order 11246 which bans employment discrimination by federal contractors on the basis of sex as well as other criteria. Many colleges and universities are federal contractors within the meaning of the Executive Order and are therefore covered by its proscription against discrimination. As we discussed in the previous article, OFCCP came under serious criticism by the Inspector General of the

Department of Labor in a 1988 report for its failure to properly enforce the law. There are encouraging indications that OFCCP is currently taking a more active enforcement role including a highly visible enforcement action against a major university. However, it is still too early to offer a definitive analysis of whether OFCCP has overcome the well-documented deficiencies of the immediately preceding years.

F. CIVIL RIGHTS ACT OF 1990

Employment discrimination continues to be an exceedingly unfortunate fact of life for women who work — or seek to work —at all levels of our educational system. The Administration's veto of the Civil Rights Act of 1990, discussed in detail in Chapter IV of this report, directly undermines their struggle to be considered fairly, on their merits, for employment opportunities. The veto, which outweighs any limited progress on civil rights enforcement which may have been made elsewhere, signals a return to the anti-civil rights stance of the Reagan years.

III. Conclusion

In conclusion, we restate the recommendations we made over a year ago. The Administration must offer high-profile and public support for civil rights enforcement and then back up those words with actions. It must devote the necessary resources to enforcement and allocate them in the most effective fashion. It must assure that, nearly twenty years after Title IX's enactment, all federal agencies finally honor their enforcement obligations, and it should take the steps identified to improve the relevant civil rights laws.

The current Administration still has the time and opportunity before it to achieve these goals. It remains to be seen whether it has the will.

Chapter VII

Minority Access to Higher Education, 1988–1990

by Jay P. Heubert

I. Introduction

Since the publication of *One Nation, Indivisible*, minority access to higher education has been affected in significant ways by legal developments and political and demographic trends. This chapter updates statistics on minority access provided in Chapter VI of *One Nation, Indivisible*. It also addresses the following areas, in which there have been important recent developments: higher-education desegregation, racial harassment on college campuses, minority scholarships, and OCR investigations into possible bias against Asian-Americans in college admissions.

Many of the developments described below are troubling. With support from the Bush Administration, efforts to desegregate public systems of higher education and to improve educational opportunities at traditionally black public postsecondary institutions have been legally undermined. At the same time, racial harassment and Bush Administration pronouncements on minority scholarships threaten minority access to equal education at traditionally white colleges and universities.

II. Statistical Trends

A. HIGH SCHOOL GRADUATION RATES

Between 1986 and 1988, high school graduation rates for white students remained constant at 82.3 percent, while those for blacks declined slightly (from 76.0 percent to 75.1 percent) and those for Hispanics fluctuated (from 59.9 percent in 1986 to 61.2 percent in 1987 to 55.2 percent in 1988).[1] Interestingly, the American Council on Education (ACE) reported in 1989 that the continuing discrepancies between white, black and Hispanic high school graduation rates "corresponded more to family income than to race."[2]

Taking a longer view, between 1976 and 1988 high school completion statistics for whites and Hispanics were virtually unchanged, while those for blacks showed a 7.6 percentage point increase, from 67.5 percent to 75.1 percent.[3] This increase seems significant, particularly considering that virtually every state increased its graduation requirements, whether through minimum competency tests or additional required courses, during the period in question. At the same time, a black-white discrepancy of 7.2 percentage points still remains, which warrants renewed efforts to encourage minority students to complete high school.

B. COLLEGE GOING RATES

After years of decline, black college going rates increased between 1988 and 1990, according to figures released by the U.S. Department of Education. Between 1982 and 1986, black enrollment had fallen 5.4 percent at private colleges and 4.6 percent at public institutions. Between 1986 and 1988, however, black enrollment rose by 7.1 percent at private institutions and by a more modest 0.2 percent at state schools. This trend was confirmed by the United Negro College Fund, which reported an increase of 5.0 percent for its 41 member institutions during the same period.[4]

Though the United Negro College Fund said that its increase was produced by equal numbers of black men and women, overall the increase was far greater for black women than for black men.[5] This is consistent with earlier reported patterns,[6] and supports the view that more must be done to make college a viable option for black men.

Experts attributed much of the rise in black college going rates to aggressive recruitment and university-operated tutoring, guidance and mentoring programs for prospective minority applicants. Another factor frequently mentioned was increased financial aid for minority students. Many institutions say that "[t]hey have ...expanded their student financial assistance programs to make up for a shrinkage in Federal [student aid] budgets of the 1980s."[7] Richard Rosser, president of the National Association of Independent Colleges and Universities, whose members showed the greatest increases in minority enrollment between 1986 and 1988, reported that "independent colleges and universities had doubled their financial assistance to students since 1980" compared to an increase of only 9 percent between 1970 and 1980.[8] This emphasis on financial assistance is hardly surprising, since researchers have confirmed the link between financial aid and minority enrollment.[9] Given this link, the federal government's recent pronouncements on minority scholarships (see section 4 below) are somewhat ominous.

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C. EARNED DEGREES

The rates at which minority students earn undergraduate degrees remain quite low. For example, as of 1987, the latest year for which statistics are now available, blacks constituted 9.2 percent of all undergraduates but received only 5.7 percent of all baccalaureate degrees; and Hispanics constituted 5.3 percent of all undergraduates but received only 2.7 percent of all baccalaureate degrees.[10]

Moreover, some minority groups earned a smaller share of all degrees than in the past. At the baccalaureate level, for example, blacks constituted 6.4 percent of degree recipients in 1976 but only 5.9 percent in 1985 and 5.7 percent in 1987. Hispanics constituted 2.7 percent of bachelor's degree recipients in 1987, a figure unchanged since 1985. Among minority groups, only Asian-Americans garnered a greater share of bachelor's degrees than in previous years.[11] Trends were similar at the master's degree level.[12] At the doctoral level, there were modest increases for Hispanics and continuing, though modest, declines for blacks.[13] One positive sign is in the first-professional degree category, where there were substantial increases in the numbers of blacks, Native Americans and Asian-Americans earning degrees; there was a slight decline, however, in the number of first professional degrees earned by Hispanics.[14]

Many of these statistics demonstrate a continuing and critical need for programs and initiatives to improve retention rates for minority students.

D. DEMOGRAPHIC TRENDS AFFECTING HIGHER EDUCATION

Demographers predict declining college enrollments for the remainder of this century. If they are correct, many postsecondary institutions may attempt to increase their enrollments by improving their minority recruitment and retention efforts.

The demographic trends seem clear. The number of college-aged students (18-22) declined by 14 percent between 1979 and 1989 and will decline by another 17 percent in the next three years.[15] The pool of nontraditional college students, those aged 25 to 35, will also go down by 8 percent in the next decade.[16] Further, there are increasing numbers of minority students in the U.S., whose college going rates remain well below those of whites; thus "the potential college population is less likely to attend institutions of higher education than in years past."[17] "In short," said one commentator in 1990, "the next three years could be the worst time for higher education in this century, except for the two world wars and the Depression. The rest of the decade promises...little respite."[18]

Where will colleges and universities find the students upon whom their very existence depends? One possible approach is to try to increase minority enrollments. If high school graduation rates and college going rates for blacks and Hispanics could be raised to the same levels as for whites, there would be over 315,000 additional college students, enough to counteract most of the predicted declines described above.[19] This suggests that colleges and universities may now have an additional incentive — self-preservation — to recruit and retain more minority students. Higher education institutions may also have new incentives to help improve elementary and secondary educational opportunities for blacks, Hispanics and others.

III. Higher Education Desegregation

In the states that have operated illegally segregated public systems of higher education, desegregation has been a critical means of securing equal opportunity for minority students, especially blacks. Remedies obtained through litigation or administrative action typically have included measures to increase the presence of minority students, faculty members and administrators at traditionally white institutions ("TWIs"). They have also included steps to enhance the academic programs, facilities, faculties and finances at traditionally black institutions ("TBIs"). Such enhancement serves both to improve educational opportunities for minority students who attend TBIs and to attract white students to TBI campuses.

Unfortunately, recent developments pose a threat to higher education desegregation efforts.

A. THE *ADAMS* LITIGATION

First, in June of 1990, a unanimous panel of the U.S. Court of Appeals for the District of Columbia dismissed the landmark *Adams* case for lack of standing.[20] Through *Adams*, plaintiffs represented by the NAACP Legal Defense and Educational Fund have sought since 1970 to compel the federal government to enforce Title VI of the Civil Rights Act of 1964 by cutting off federal funds to illegally segregated public university systems.

In support of its claim of standing, the Legal Defense Fund argued that the only meaningful mechanism for enforcing Title VI was through a suit against the federal government, since suits against each state in question were too costly and time-consuming. The court disagreed, asserting that "[s]uits directly against the discriminating entities may be more arduous, and less effective in providing systematic relief, than continuing judicial oversight of federal government enforcement. But under our precedent, situation-specific litigation affords an adequate, even if imperfect, remedy."[21]

This decision means that potential plaintiffs have no choice but to sue individually each state that they believe to be out of compliance with Title VI. It also means that there is no way to ensure that the federal government discharges its legal duty to enforce Title VI. These developments are troubling given the great costs and other difficulties of mounting litigation against public systems of higher education and the federal government's continuing reluctance to enforce Title VI vigorously.[22]

B. JUDICIAL INTERPRETATIONS OF THE DUTY TO DESEGREGATE: *AYERS V. ALLAIN*

Even more serious is the recent decision in *Ayers v. Allain*, in which the Fifth Circuit Court of Appeals, rejecting the logic that has formed the basis of virtually every higher education desegregation remedy since *Adams*, ruled *en banc* that a state satisfies its duty to desegregate a previously segregated system of public education merely "by discontinuing prior discriminatory practices and adopting and implementing good-faith, race-neutral policies and procedures."[23]

This 9-5 decision (with Judges Goldberg, Johnson, Politz, King and Higginbotham dissenting) expressly rejects the application to higher education of the standard set forth in *Green v. School Board of New Kent County*,[24] under which a racially dual system of public education must be dismantled and its vestiges eliminated "root and branch."[25] It is based instead on *Bazemore v. Friday*,[26] in which the Supreme Court, 5-4, ruled that an all-white 4H club at a previously segregated university was not a vestige of state-imposed segregation since individual students decide on a purely voluntary basis whether to join. Both the defendants and the Department of Justice, plaintiff-intervenor, argued for application of *Bazemore*. (In early 1991, however, the Justice Department apparently modified this position, and now seeks some middle ground between *Bazemore* and *Green*.)

The *Ayers* majority reasoned that student enrollment decisions in Mississippi are likewise entirely voluntary, and do not constitute a continuing vestige of state-imposed segregation, unless the state of Mississippi still discriminatorily prevents students from enrolling at the public universities of their choice. Finding that student enrollment decisions are not produced by current discriminatory conduct on Mississippi's part, the Court of Appeals held that Mississippi's system of public higher education is in full compliance with the Equal Protection Clause and Title VI. Accordingly, the case was dismissed outright.

The *Ayers* court reached this result even though, at time of trial in 1986:

_ More than 99 percent of white students were enrolled at five TWIs and over 71 percent of black students were enrolled at three TBIs;

— Standards for freshman admission still in effect had been adopted with discriminatory intent days after James Meredith sought admission to Ole Miss in 1962;

— More than 97 percent of faculty members at TWIs were white, compared with less than a third at TBIs;

— Faculty salaries, and the proportion of faculty members possessing terminal degrees, were significantly higher at TWIs than at TBIs;

— The five TWIs operated a total of 213 masters degree programs, 65 specialist programs and 110 doctoral programs, compared with 23 masters programs, 1 specialist program and no doctoral programs at the three TBIs; and

— Per pupil expenditures at TWIs were 41 percent higher than those at TBIs, with far higher discrepancies in earlier years.[27]

Indeed, most of these statistics were not even mentioned in the *en banc* decision;[28] the majority apparently considered them irrelevant once it found that no current state policy or practice discriminatorily influences student enrollment decisions.[29]

Ayers is flatly inconsistent with every other decision in which a court has considered whether *Bazemore* or *Green* applies where previously segregated postsecondary institutions remain racially identifiable.[30] In *United States v. State of Louisiana*, for example, the three-judge district court (including Judge Wisdom) rejected the view that students have a wholly free choice in deciding whether to attend TWIs or TBIs against a background of state-imposed segregation and unequal state support, especially where the state has deliberately fostered programmatic duplication between proximate TWIs and TBIs.[31] In addition, both the Louisiana court and the Sixth Circuit in *Geier* said that by its very importance higher education is more like elementary and secondary education (subject to *Green*) than like membership in an extracurricular club (subject to *Bazemore*).[32]

If the duty of a state once segregated by law is only to abandon its discriminatory purpose and eliminate formal barriers to desegregation, virtually every state will be found to have discharged its obligations under the Fourteenth Amendment and Title VI. Indeed, within weeks of *Ayers* the district court in the Louisiana higher education desegregation case, believing itself to be bound by the Fifth Circuit's holding, reluctantly dismissed that case,[33] in which extensive orders had been issued only recently.[34] Should the *Ayers* standard becomes the law of the land, higher education desegregation efforts in the U.S. will likely draw to a close.

The private plaintiffs in *Ayers*, represented by Northern Mississippi Rural Legal Services and the Center for Law and Education, have petitioned for Supreme Court review. The case appears to be "*cert*worthy"; the issue it presents is one of great importance and one on which the lower courts have been divided.[35] The Department of Justice now supports the petition for Supreme Court review and will apparently take a legal position falling somewhere between *Bazemore* and *Green*. Should the Supreme Court agree to review *Ayers*, any decision it reaches will have broad significance for all desegregation efforts in higher education.

C. IMPACT OF THE CIVIL RIGHTS RESTORATION ACT

One development favorable to effective higher education desegregation has been the enactment, over President

Reagan's veto, of the Civil Rights Restoration Act ("CRRA").[36] After the Supreme Court's 1984 decision in *Grove City v. Bell*,[37] at least one court of appeals had dismissed Title VI claims in a higher education desegregation case because the plaintiffs had not specified which of the defendants' programs received federal funds directly. The case in question arose in Alabama.[38]

Since enactment of the CRRA, with its provisions on institution-wide coverage, however, the Alabama case has gone forward and the program specificity issue has not been an obstacle to relief in higher education desegregation cases in other states involved in litigation, such as Louisiana and Mississippi.[39] In all three cases, moreover, the courts have either expressly ruled or simply assumed that the CRRA applies retroactively to actions of the defendants that occurred before the statute's enactment.[40]

IV. Racial Harassment on Campus

Another issue affecting minority access to higher education is racial harassment.

A. THE SCOPE OF THE PROBLEM

There have been serious incidents of racial harassment at college campuses in all regions of the country:

— At the University of Connecticut eight Asian-Americans on their way to a dance were harassed by students who spit on them and called them "Oriental faggots."[41]

— At Arizona State University, several black students were surrounded by fraternity members who hurled such racial epithets as "fuck you, nigger," "coon" and "porchmonkey." Later, two black students were beaten by members of the same fraternity until police arrived and took the black students into custody.[42]

— At Wesleyan, a dining room at the Center for Afro-American Studies was spray painted with racial slurs and threats.[43]

— At Emory University, a black student found racial epithets scrawled in her dormitory room and her stuffed animals ripped apart.[44]

Other campuses where racial incidents have been reported include the University of Massachusetts, the Citadel, Smith College, Brown University, the University of Michigan, the University of Wisconsin and the University of Florida.[45] According to the National Institute Against Prejudice and Violence, more than 300 colleges and universities have reported recent incidents of racial harassment or violence.[46] The Carnegie Foundation for the Advancement of Teaching, citing racial harassment as evidence of an overall decline in standards of civility, issued a report in 1990 asserting that the fabric of campus life was in tatters.[47]

Racial harassment causes a variety of serious harms. First, it can wound its victims deeply, deny them equal access to a college education, and deny them the opportunity to participate fully in the life of a college community.[48] Harassment can also undermine efforts to achieve racially diverse faculties and student bodies. At Dartmouth College, a professor long the target of attacks by student members of the *Dartmouth Review* finally resigned, leaving fewer black faculty members there than at any time in recent history. Student enrollments have also been affected, at Dartmouth and elsewhere; the *New York Times* reports that "[r]ecent cases of racial harassment on the nation's campuses and a general atmosphere of racial tension have become increasingly important factors in the decisions made by many black parents about where to send their children to college....inducing more families to send their children to historically black colleges to avoid the issue altogether."[49]

B. OCR'S RESPONSE

In September of 1990, shortly after assuming office as Assistant Secretary of Education for Civil Rights, Michael L. Williams announced that OCR would soon begin to focus its compliance reviews on several issues, among them racial harassment on college campuses.[50] Several months later, even as critics doubted whether OCR possessed either the commitment or the necessary resources, Williams renewed his pledge, announcing that OCR would "draft policy statements on each...priorit[y] to provide guidance for institutions and federal investigators."[51] To date there has been no indication of what provisions a policy statement on racial harassment might contain.

C. INSTITUTIONAL RESPONSES

There are many ways in which institutions, by educational means and by example, have addressed racial harassment. One has been to condemn it when it occurs, on campus or off. Another has been to create opportunities, in and out of class, for students and others to discuss and resolve potential racial conflicts. A third has been to offer a curriculum that reflects and respects the contributions and concerns of minority-group members. A fourth has been to encourage the use of pedagogies that promote active class participation by all students. Yet another approach has been to increase minority representation among student bodies, faculties and administrative staffs.

Many institutions also address racial harassment by prohibiting and punishing it in some or all of its forms. It is fairly common, for example, for institutions to enforce rules that prohibit physical assault, physical intimidation, physical obstruction of free movement, and damage to property, whether or not such conduct is motivated by racial animus. Such rules could be grounds for discipline in most of the situations described in section A above.

Some institutions also penalize students who engage in purely verbal harassment of other members of the campus community. By late 1989 some fifteen institutions had moved to adopt penalties covering racial and other abuse that is purely verbal.[52] For example:

- The University of Michigan until recently prohibited in academic buildings "any expression that stigmatizes or victimizes an individual on the basis of race, ethnicity, religion, gender [or] sexual preference...or that threatens or foreseeably interferes with a student's education or other campus related pursuits."[53]

- The University of Wisconsin punishes students "for racist or discriminatory comments, epithets or other expressive behavior directed at an individual...if [they] intentionally demean the race, religion, color, sex, creed, disability, sexual orientation, national origin, ancestry or age of the individual...and create an intimidating, hostile or demeaning environment for education, university-related work or other university-authorized activity."[54]

- Stanford University forbids its students to use "speech or other expression" that is "intended to [directly] insult or stigmatize an individual or a small number of individuals on the basis of their sex, race, color, handicap, religion, sexual orientation or national and ethnic origin.[55]

- Harvard College, while generally preferring to censure rather than censor offensive speech, nonetheless asserts the authority to punish student speech or behavior that, on a continual basis, shows "grave disrespect for others" because of their "race, gender, ethnic group, religious beliefs, or sexual orientation."[56]

- The State University of New York at Buffalo notes on a student's transcript his or her use of racist language, and alerts prospective employers and (for would-be lawyers) the bar association.[57]

Of the schools that do punish verbal abuse, some prohibit only "direct, intentional, verbal assaults, personal confrontations where angry or hateful epithets are hurled at particular students."[58] This definition loosely parallels that of "fighting words," which are not constitutionally protected (see section D).

D. LEGAL ISSUES

Institutional efforts to punish racial harassment raise several legal issues for postsecondary institutions.

The most important is whether universities abridge free speech rights when they discipline students for racial abuse. Under the First Amendment to the U.S. Constitution, public universities[59] are free to adopt reasonable rules of conduct as long as the rules are not aimed at suppressing or punishing expression of particular ideas. Thus the Constitution imposes few limitations on the authority of public institutions to discipline students who engage in assault, physical intimidation or destruction of property.

When a public university prohibits racially abusive expression, however, it plainly does seek to punish or suppress speech based on content. A federal district court employed such logic in striking down a policy of the University of Michigan under which students could be punished for "stigmatizing or victimizing" individuals or groups on the basis of race or other criteria.[60]

But the First Amendment is not absolute, and some scholars maintain that certain regulation of verbal harassment is Constitutional.[61] Among their arguments are these:

— In its opinions on obscenity, the Supreme Court has recognized that some expression is so worthless and/or so offensive to others as to warrant no Constitutional protection; the same should perhaps be true for racial epithets and other grossly offensive verbal abuse.

— In its opinions on defamation, the Supreme Court has ruled that it is appropriate to balance rights of expression against the interests of an individual whose reputation is injured by false statements; courts could extend similar protection to members of groups that are defamed.[62]

— The Supreme Court has ruled that "fighting words" — "words that by their very utterance inflict injury or tend to incite an immediate breach of the peace" — are not protected by the First Amendment. This exception may cover some face to face racial harassment as well.[63]

— Content-based suppression or punishment is permissible where the expression in question "is directed to inciting or producing imminent lawless action and is likely [to do so]."[64] In the education context, such suppression or punishment is permissible where the expression "is likely to cause imminent and substantial disruption of the school or infringe the rights of others."[65] Some verbal harassment may be punishable under this standard.

— The Supreme Court has ruled that Title VII of the Civil Rights Act of 1964 forbids sexual harassment — including verbal harassment — that creates a hostile work environment, and that employers are often liable for such harassment.[66] A similar argument can be made for racial harassment on campus, and for an institutional duty to prevent or halt it.

— The Equal Protection Clause requires public institutions to provide equal educational opportunity to their minority students. If racial harassment denies equal opportunity, there is a potential conflict between an institution's obligations under the First and Fourteenth Amendments, which can only be resolved by balancing competing interests rather than by regarding either as absolute.[67]

Other scholars disagree, of course, and ultimately the Supreme Court will have to resolve these constitutional questions.

Nor is free speech the only legal issue that racial harassment cases can raise for postsecondary institutions. Two lawsuits were filed, for example, when Dartmouth College sought to discipline student members of the *Dartmouth Review* accused of having intimidated and verbally harassed a black professor in his classroom.

The first, filed under Title VI and Section 1981, alleged that Dartmouth's decision to discipline the students constituted discrimination based on race since they would not have been disciplined but for the fact that the professor was black and they were white. The Court of Appeals for the First Circuit dismissed their claim.[68]

The second suit, brought in state court, asserted that Dartmouth had breached its contractual obligations by violating an institutional rule that guarantees students "due process of law" in school disciplinary proceedings. The students argued, among other things, that a Dartmouth dean could not judge impartially the disciplinary charges against them once Dartmouth's president had publicly condemned the conduct in question. The state court was sympathetic.[69] This suggests that when senior administrators condemn acts of racial harassment on campus — as they must — steps should also be taken to protect the integrity of school disciplinary proceedings; such steps could include recusal of key administrators and/or appointment of outside hearing officers to consider disciplinary charges.

E. EXTRALEGAL CONSIDERATIONS

Even if the courts eventually rule that universities may punish verbal abuse, it will remain for institutions to decide whether they wish to do so. There has been a national debate on this question.

Those who oppose punishing verbal abuse contend that college campuses should be seen as "sanctuar[ies] in which knowledge and truth [may] be pursued — and imparted — with impunity, no matter how unpopular, distasteful, or politically heterodox the process [may] be."[70] Others fear that minority voices will be among the first to be stilled if universities begin to punish speech that trustees or administrators deem demeaning or deeply offensive.[71]

Proponents of rules punishing verbal abuse focus on the harms that result when verbal harassment "interferes with the abused students' ability to study and learn, undermines their self-respect and leads to feelings of defensiveness, anger, shame, helplessness, and to a withdrawal from campus activities."[72] They believe, moreover, that vigorous debate is undermined rather than served by racially abusive speech, since robust debate is most likely to occur in an atmosphere free of intimidation and abuse. From this perspective, campus rules punishing "hate speech" both protect the potential victims of abuse and promote the free exchange of ideas.

In part because these are difficult issues, institutions may wish to employ a variety of strategies for preventing racial harassment and ensuring equal opportunity on campus; some of these are described at the start of section C. Whether or not a school elects to punish verbal abuse, such approaches can help prevent racial harassment and demonstrate an institutional commitment to equal opportunity.

V. Minority Scholarships

In December 1990, Michael Williams, Assistant Secretary of Education for Civil Rights, asserted that postsecondary institutions that receive federal funds violate Title VI if they award scholarships for which only minority students are eligible. In so doing, Williams reversed a longstanding OCR policy, adopted in 1972 and reaffirmed several times since then, under which such scholarships are permissible if (a) a university is not adequately serving members of a particular racial or nationality group and (b) the minority scholarship program "does not limit nonminority students from applying and qualifying for the major proportion of financial assistance administered by the school."[73] [In March 1991, Lamar Alexander, the new Secretary of Education, withdrew OCR's new policy pending review. He urged colleges to maintain their minority scholarship programs in the interim.]

Williams initially raised the issue in a letter to the director of the Fiesta Bowl, a privately sponsored football game held annually. Fiesta Bowl officials had announced a plan to donate $100,000 to each team participating in 1990, to be used to fund scholarships for minority students. The Williams letter acknowledged that the Fiesta Bowl, as a private entity receiving no federal financial assistance, was not subject to Title VI and was free to award "race-exclusive" scholarships directly to students at the participating universities. It also asserted, however, that the two universities, which do receive federal funds, would violate Title VI if they "receive[d] or disperse[d]" [sic] such funds, or assisted the Fiesta Bowl directly or indirectly in its effort to award such scholarships.[74] The letter went on to suggest that the Fiesta Bowl consider changing the scholarship fund "from a race-exclusive program to...a program in which race is considered a positive factor amongst similarly qualified individuals."[75]

OCR then announced that "it was generally illegal for a college to offer a scholarship only to minority students."[76] The reaction was swift and overwhelming. Educators from all parts of the country, joined by many political leaders, sharply critized OCR's new position.[77]

Responding to this political pressure, the White House reviewed the situation amid rumors that OCR's interpretation would be withdrawn altogether. Several days later, however, through a press release dated December 18, OCR issued a revised policy on minority scholarships.[78] The revised policy has also been widely and sharply criticized,[79] as has a recent OCR memorandum challenging the legality of an Oregon program providing tuition waivers to minority students.[80]

As OCR reviews its policy and the debate continues, this section discusses the following questions: (a) what the revised policy says, (b) whether it differs significantly from its immediate precedessor, (c) how many institutions operate scholarship programs that are inconsistent with OCR's interpretation of Title VI, and (d) the legal force and validity of OCR's new policy. Each issue is discussed separately below.

A. WHAT OCR'S REVISED POLICY SAYS

One important question that remains is what OCR's revised policy actually means. As noted above, OCR issued a press release on December 18 describing its position on scholarships for which only minority students are eligible. To date, this press release is OCR's only written statement of its present position. It has several parts.

First, the press release asserts that the legality of minority scholarships under Title VI hinges on where the scholarship funds originate. Under OCR's present reading of Title VI, a university receiving federal funds may "administer scholarships established and funded entirely by private persons or entities where the donor restricts eligibility for such scholarships to minority students."[81] OCR also believes, however, that "universities receiving federal funds may not fund race-exclusive scholarships with their own funds."[82] Of minority scholarships funded by state and local governmental entities, the press release says cryptically that such scholarships "cannot be addressed administratively" because they are "covered by the Supreme Court's decisions construing the Constitution";[83] Williams has stated publicly, however, that he considers "any such use of state funds [to be] unconstitutional" under Supreme Court decisions on racial set-asides.[84] Lastly, the statement makes no reference whatever to the federal government, which runs at least two large minority scholarship programs.[85]

Second, the press release asserts that OCR "will provide universities a four-year transition period" before initiating "a broad compliance review with respect to minority scholarships."[86] It also states, however, that during the four-year period OCR "will fulfill its statutory obligation to investigate any complaints received."[87]

B. COMPARING THE ORIGINAL AND REVISED POLICIES

In early December, in his first public pronouncements on minority scholarships, Michael Williams stated categorically that Title VI is violated whenever students at a university receiving federal funds get financial aid for which only minority students are eligible. How significant are the differences between this position and the views set forth in OCR's press release of December 18?

Williams himself implied that the change was significant,[88] and most newspapers accepted that view. The *Washington Post* spoke of a "reversal," the *Washington Times* saw the administration "retreating," the *Wall Street Journal* claimed that the government had "reversed" itself, and the *Los Angeles Times* believed that the government's initial position had been "abandoned."[89] The *New York Times*, by contrast, reported that the government had "let stand" its curb on minority scholarships,[90] and a commentator in the *Christian Science Monitor* ruefully opined that OCR had "turned around...about 359 degrees by my calculations."[91] Unfortunately, the *New York Times* and the *Christian Science Monitor* have proven correct.

There are several problems, for example, with the Title VI exemption that OCR seeks to create for scholarships administered by federal fund recipients using funds from private donors.

One is that the exemption may not survive legal review. As clarified by the Civil Rights Restoration Act, Title VI covers all actions of a federal-fund recipient. Thus a university receiving federal funds is in the same legal position when it administers scholarship funds received from private entities as when it administers scholarship programs funded through its own operating budget or endowment; as long as the federal-fund recipient is the administrator, Title VI applies. Put another way, if it is discriminatory for an institution to use its own funds for minority scholarships it is equally problematic for an institution to administer minority scholarships funded through private contributions. This logic makes hash of OCR's distinction, a point that civil rights leaders have made[92,93] and Michael Williams himself has virtually conceded. The position Williams took in his letter to Fiesta Bowl officials — that Title VI prohibits federal fund recipients from administering, receiving, disbursing, or assisting with scholarships that illegally discriminate — is surely the correct one. This is not to concede, of course, that minority scholarships do, in fact, discriminate.[94]

A second problem, under the revised policy no less than under its predecessor, is that the vast majority of existing minority scholarship programs are funded not by private entities but through institutional mechanisms that OCR says are illegal.[95] The next largest source of support for minority scholarships, moreover, is the states themselves,[96] and while OCR asserts that it has no jurisdiction over such programs[97] and some commentators believe that OCR will leave such programs alone, OCR does not, in fact, lack such jurisdiction,[98,99] and Michael Willams has said he considers them illegal.

Third, it matters little that OCR has postponed a "broad compliance review" for four years. Through the vast publicity it has given to the issue and by making it clear that it sympathizes with those who would challenge such programs, the Administration has virtually assured that there will be a flood of complaints about minority scholarship programs during the next four years. President Bush has all but invited litigation,[100] and conservative organizations have said they will gladly comply.[101] [In March 1991, shortly after OCR's policy had been withdrawn for review, a lawsuit challenging the legality of minority scholarships was filed against OCR.] For its part, OCR has made abundantly clear its own willingness to investigate any complaints it receives, as OCR's recent challenge to a minority fellowship program in Oregon demonstrates.[102]

For all these reasons, most differences between OCR's earlier position and its December 18 press release are largely inconsequential.

There is one possible exception, however. In his letter to Fiesta Bowl officials, Williams asserted that Title VI prohibits federal fund recipients from awarding **any** "race-exclusive" scholarships, *i.e.*, scholarships for which only minority students are eligible. His letter implies that under Title VI, race may never be taken into account except "as a positive factor among similarly qualified individuals."[103] OCR's December 18 press release also calls into question almost all "race-exclusive" scholarships.[104]

Subsequent statements by Etta Fielek, the Department of Education's press spokesperson, however, suggest that OCR may now consider it permissible to reserve certain scholarships for minority students as long as the students are entitled to assistance partly based on merit or need. According to Ms. Fielek, OCR is concerned under its revised policy only about scholarships based *solely* on race, while awards that are based partly on race and also on factors such as financial need or merit pose no legal problem. "Race would have to be the only factor," she is reported to have said when asked whether scholarships based predominantly on race would be forbidden under Title VI. "Race as one of several factors has always been fine within our interpretation of the law. Race tied in with need, or with merit, is totally appropriate. It's [only a problem] when race is the only factor."[105]

It is possible, of course, that these statements reflect institutional confusion rather than an actual change in Administration policy. When told of Fielek's remarks, Richard Rosser, executive director of the National Association of Independent Colleges and Universities, replied, "The definition of a program was never gotten into. We can't figure this out. Every time we ask over there we seem to get different answers."[106] Robert Atwell, president of the American Council on Education, "said he had little confidence in Fielek's comments about what programs are at issue....[H]e remains wary because the entire matter has been so clouded [and] several interpretations of the policy are still possible."[107]

On the other hand, the Administration may be looking for a way to abandon its earlier position without appearing to endorse scholarships awarded solely based on race. Fielek's position could enable the Administration to characterize the entire affair as a misunderstanding. [Secretary Alexander's decision to withdraw OCR's policy pending review is also quite significant, of course. It suggests that the policy may be modified further or retracted altogether.]

C. FINANCIAL AID PROGRAMS AFFECTED

How many financial aid programs, and how many individual students, are potentially affected by OCR's interpretation of Title VI? Unfortunately, the Administration changed its position on minority scholarships without even attempting to ascertain how many scholarships or how many scholarship programs the change would affect. Neither did OCR attempt to gauge what effect such scholarships and programs have on minority enrollment.

All OCR has said is that only certain scholarship criteria and certain funding mechanisms violate Title VI. Determining the impact of OCR's new policy on financial aid programs, therefore, requires information on both the criteria for awarding minority scholarships and the means by which such scholarships are funded. The information on both points remains incomplete at present, both because there has been little reason to collect it before now and, perhaps, because some institutions may wish to avoid disclosing facts that could lead to Title VI complaints.

Etta Fielek, the Education Department's spokesperson, thinks that few scholarships will be affected: "We believe the number of scholarships that are race-exclusive under the narrowest definition is a small number."[108] Others agree that the number of programs awarded solely on the basis of race is low but indicate that many institutions award race-based financial aid to students who also demonstrate need and/or merit.[109] This information is entirely anecdotal, however, and provides little sense of the national picture.

One source of national information on minority scholarships is the College Entrance Examination Board. The College Board reported in December that it has no information about the number or value of minority scholarships.[110] It did claim to have national data on minority scholarship programs, but the information, at least as reported by the newspapers, has seemed to change almost daily.

On December 20, the College Board's director of information services reported that of 3,138 institutions included in the Board's 1990 survey, at least 785 offer scholarships based at least in part on a student's race and 332 private colleges report that minority status is a criterion for some scholarships.[111] On December 21, however, a "correction" was published, which attributed to the College Board the view that "there are 696 colleges that award minority scholarships without regard to need and 785 that award them based on need. A total of 1,070, or 37 percent of 2,918 accredited colleges that responded to the Board's 1990 survey, provide minority scholarships that fall into one of these two categories."[112] Two days later, however, newspaper reports said that the College Board had found that "34 percent of the nation's 3,138 accredited colleges consider a student's minority status in awarding scholarships," but that the Board's survey had not asked "whether belonging to a racial minority was the predominant factor in any scholarships, a condition that would make them racially exclusive."[113]

These reports are not merely different; they are inconsistent. Thus, even if it were clear what OCR's policy is — which it is not — it would be difficult to determine how many institutions operate programs at odds with that policy. It also appears to be impossible at present to assess how many students receive scholarships under these programs. Notwithstanding the inconsistencies, however, the statistics do suggest that many institutions may be operating programs inconsistent with OCR's interpretations of Title VI; this number would be lower if Etta Fielek's statement of the OCR position proves accurate, and higher if it does not. Further, since the number of schools affected may range from 700 to nearly 1500 (depending on how narrowly OCR's policy is interpreted) it is reasonable to assume that thousands and possibly tens of thousands of minority students' scholarships may likewise be at odds with OCR's interpretations of Title VI.

Assessing the impact of OCR's initiative is further complicated by the funding issue. As noted above, OCR says — though the position is legally weak — that institutions may administer minority scholarships using funds privately contributed for that purpose, but may not use their own funds. OCR also regards state-funded minority scholarships to be unconstitutional, and unconstitutional actions by states may also violate Title VI since all state universities receive federal funds.

Accordingly, it is significant that while privately funded minority scholarships do exist,[114] the majority of minority scholarship programs appear to be funded out of institutional coffers, with most of the remainder funded by states.

The statistics cited above demonstrate that many postsecondary institutions — College Board figures suggest that the number may exceed 1000 — operate their own minority scholarship programs; under OCR's interpretation of Title VI, some or all of these would probably be illegal.

There are also many state programs. At the University of California, for example, about 8 percent of the system's $335 million in scholarship assistance is reserved for minority graduate students,[115] and at the University of Maryland 121 high-achieving black students recently received Benjamin Banneker scholarships for which only minority students are eligible.[116] One recent national survey revealed that 10 states, most through legislation, have established programs awarding scholarships for which only minority students are eligible. These include Florida, Iowa, Kansas, Michigan, Minnesota, New York, North Carolina, Tennessee, Texas and Wisconsin.[117] In Wisconsin alone, $2.2 million has been awarded this year to 1,300 minority students.[118] OCR doubtless considers some or all of these to be unconstitutional; if that is correct, they probably violate Title VI as well, since all states and public university systems receive federal financial assistance.

If OCR's legal interpretation is sustained, therefore, it appears than many minority scholarship programs will be in jeopardy. These include programs operated by institutions, programs funded by states, and probably — for reasons set forth in section B above — programs funded privately but administered by universities that receive federal funds. Whether the programs affected number in the hundreds or over a thousand depends largely on how narrowly OCR intends to interpret Title VI.[119]

D. THE LEGAL FORCE AND VALIDITY OF OCR'S POLICY

Ultimately, the Administration's pronouncements on minority scholarships will be sustained only if they are legally sound. It is appropriate, therefore, to examine OCR's legal position.

OCR's statements on minority scholarships raise several legal issues. A threshold question is what legal effect OCR's interpretation of Title VI has, considering that it was issued in a press release rather than through formal regulations. A second, and ultimately critical, question is whether OCR is correct in saying that awarding minority scholarships constitutes illegal discrimination and violates Title VI. Other legal questions have already been discussed above.[120]

What legal effect does an OCR press release have? David Tatel, former director of OCR, answered this question concisely in recent testimony before the House Committee on Education and Labor. He said:

> "OCR has no authority to 'tell' anyone that some minority scholarships are now suddenly illegal simply by making an announcement. OCR can bind recipients of federal funds in only two ways: either by formal regulation, which involves publishing a Notice of Proposed Rulemaking and inviting public comment; or by initiating formal fund termination proceedings and prevailing before an Administrative Law Judge and, if necessary, a federal court. Since OCR has used neither of these procedures, its announcements should be viewed by recipients of federal funds as no more than the Assistant Secretary's opinion as to how Title VI applies to minority scholarships.[121]

Tatel is correct. For OCR to call minority scholarships illegal does not make them so. As Tatel points out, moreover, OCR's actions in December illustrate powerfully why government should consult widely before it attempts to establish or change national policy on important issues:

> [Proceeding through the normal regulatory process] would have enabled OCR to hear and consider the views of the university community, of civil rights organizations, and of the business community. It would also have enabled OCR to learn some very important facts about minority scholarships that the agency clearly does not know, such as the number and scope of such scholarships, the extent to which such scholarships are funded by private donors, the impact such scholarships have had on minority enrollments and higher education, the proportion of total scholarship aid that minority scholarships represent, and the impact, if any, that minority scholarship programs have had on non-minority students. It is, to say the least, disappointing that OCR attempted to deal with this important issue without such information.[122]

It is also ironic that an Administration that has criticized government by administrative fiat — as, for example, when the Reagan Administration challenged the authority of the Internal Revenue Service to deny tax-exempt status to racially discriminatory private schools — would think it appropriate for an unelected agency official to attempt to reverse an important national policy through a press release issued without notice or any opportunity for public comment.

As a legal matter, when the issue of minority scholarships is litigated courts should give OCR's interpretation of Title VI no more weight than they would accord to the position of any litigant, unless OCR has promulgated formal regulations by that time. As a practical matter, OCR's changes of position and the obvious political influences on OCR's actions may incline some judges to accord less rather than more deference to whatever position OCR eventually takes in court.

The most important legal question OCR's policy raises is whether, as OCR contends, it is illegal under Title VI for federal fund recipients to offer scholarships for which only minority students are eligible. For reasons set forth below, OCR's interpretation is dubious: it is inconsistent with OCR's own prior written statements on minority scholarships and, more important, it seems inconsistent with Supreme Court decisions on affirmative action.

As long ago as 1972, during the Nixon administration, OCR informed presidents of all higher education institutions then receiving federal funds that "[s]tudent financial aid programs based on race or national origin may be consistent with Title VI if the purpose of such aid is to overcome the effects of past discrimination."[123] After the Supreme Court's 1978 decision in *Bakke*,[124] a decision on which OCR now relies in attacking the legality of minority scholarships, OCR reviewed its 1972 interpretation of Title VI and did not modify its view that minority scholarships are permissible.[125] Indeed, for more than a decade, and even on several occasions since Ronald Reagan took office, OCR has relied on *Bakke* in concluding that minority scholarships do not violate Title VI.[126]

First, in response to a complaint about "minority tuition fellowships" offered by the Massachusetts Institute of Technology, OCR in September 1981 ruled that scholarships for which only minority students are eligible do not violate Title VI. OCR cited Title VI regulations stating that "where a university is not adequately serving members of a particular racial or nationality group it may establish special recruitment policies ...and take other steps to provide that group with more adequate service."[127] In support of this interpretation OCR cited a congressional finding, made in enacting the Graduate and Professional Opportunities Program,[128] that minorities are underrepresented nationally in graduate and professional programs.[129] It also expressly stated that *Bakke's* limits on voluntary affirmative action in admissions do not apply where financial aid is concerned: "The issue in this case is not one of discriminatory exclusion. While attendance is made more difficult for some students than for others, grants and loans are available from other sources."[130]

Second, in 1983 the Deputy Assistant Secretary for Civil Rights, in a policy clarification concerning three scholarship programs restricted to minority students, said that the programs were consistent with Title VI.[131] She wrote:

> We do not believe that *Bakke* is controlling as to the award of student financial aid, as the decision addresses issues relating only to admissions. It is important to note the distinction between financial aid and admissions. It is our understanding that students are admitted to the Denver Graduate School of Business and Public Management according to ordinary criteria. The issue in this case is not one of exclusion from school on the basis of race or national origin.
>
> The administration of the two privately financed fellowships you described does not limit nonminority students from applying and qualifying for the major proportion of financial assistance administered by the school. These minority fellowships are voluntary affirmative action efforts that are intended to increase minority representation in specified fields and financed by private grants of limited duration. Accordingly we conclude that administering these fellowships does not place the University in violation of Title VI.[132]

The same memorandum explained why the federal Graduate and Professional Opportunities Program is also consistent with Title VI and *Bakke*.[133] One "minority scholarship" program that OCR did express concern about would have served only Dutch students; in responding OCR noted that it was unaware of any determination that Dutch Americans have been victims of discrimination in federally financed programs.[134] A second program that OCR questioned involved administration by Dartmouth College of a grant to be provided annually by a private corporation to a minority student at Dartmouth. OCR recommended that the award be "geared more to the economically disadvantaged with an emphasis on minority students."[135] Ironically, under OCR's present interpretation of Title VI, such a grant from a private donor would be permissible.

It is apparent that these decisions, all made during Republican administrations, are inconsistent with OCR's current position on minority scholarships.

More important, as OCR's own earlier analyses confirm, OCR is mistaken in asserting that its present policy is supported by Supreme Court decisions on voluntary affirmative action.

The Supreme Court has determined that race-based affirmative action is permissible under the Constitution and Title VI where (a) it serves a "compelling" or "important" interest and (b) the means chosen are "narrowly drawn" to advance that interest. In *Bakke*, for example, the Supreme Court established the principle, reaffirmed in June of 1990,[136] that a university's objective in achieving a diverse student body is one such "compelling" interest. The Court has also recognized that universities and other entities have a compelling interest in eliminating the vestiges of their own prior discrimination.

To be "narrowly drawn," affirmative action programs must place as low a burden on nonbeneficiaries as is consistent with achievement of the compelling or important objective the program is designed to serve. In *Bakke*, for example, the Supreme Court ruled that a university's compelling interest in achieving a diverse student body does not justify setting aside certain seats for which only minority applicants may compete. Such an approach was deemed impermissible because the interest in diversity can be advanced satisfactorily through a less restrictive means, namely giving a "plus" to each minority candidate of sufficient size to produce the degree of diversity the institution seeks. Such an approach, which the Supreme Court approved in *Bakke*, is permissible even if — as is always the case with affirmative action in admissions — the result of such a "plus" system is to deny admission outright to some white candidates who are better qualified than minority applicants the school has admitted.

On campuses where the underrepresentation of minority students is due to a school's prior discrimination, minority scholarship programs serve an interest, judicially recognized as compelling, in eliminating the vestiges of that discrimination.[137] On any campus where minority students are underrepresented, however — and this is true of most, if not all, the universities that award minority scholarships — minority scholarship programs serve a second and quite distinct compelling interest: that in achieving a diverse student body. In this sense they are wholly unlike the minority set-aside provisions for construction contracts in Richmond, Virginia that the Supreme Court invalidated in 1989,[138] and OCR errs in asserting that rules governing construction contracts apply with equal force to minority scholarship programs. Since minority scholarship programs serve at least one and sometimes two compelling interests, they plainly satisfy the first legal test established by the Supreme Court.

For two reasons, minority scholarship programs also seem to satisfy the requirement that affirmative actions be narrowly drawn.

First, the burden on whites created by minority scholarship programs — denial of access to a small portion of all financial aid[139] — is far less than outright denial of admission, a burden on whites that the *Bakke* Court found to be legally permissible. As noted above, this is the rationale OCR offered until recently to justify minority scholarship programs.

Second, there is no evidence that less restrictive ways of increasing minority enrollment will actually produce the desired result. As noted above, the *Bakke* Court rejected an affirmative plan under which the University of California had set aside certain seats for which only minority students could compete. It is tempting, moreover, to equate this illegal arrangement with minority scholarship programs, which concededly set aside certain scholarship funds for which only minority students may apply.

But the two situations are different. In *Bakke*, a "set-aside" approach was invalidated not because such an arrangement was *per se* illegal but because there existed a less restrictive alternative — the "plus" system described above — by which the University of California could achieve its compelling objective of increased diversity.

In what ways "less restrictive" than minority scholarship programs could postsecondary institutions use their financial aid to promote diversity on campus? As noted above, Michael Williams's letter to the Fiesta Bowl suggested that the minority scholarship fund be changed "from a race-exclusive program to...a program in which race is considered a positive factor amongst similarly qualified individuals."[140] Others have suggested that scholarships based solely or primarily on student financial need would also serve to increase minority enrollments since minority students are proportionately overrepresented among those with financial need.

There is no evidence, however, that a university's compelling interest in a diverse student body could be served adequately by such alternative approaches. Indeed, the exact opposite is probably the case. The vast majority of financial aid in the U.S. is awarded based on financial need, and it is apparent from enrollment patterns on most campuses that need-based aid has not, by itself, served to increase minority enrollments sufficiently. While it is true that minority students have greater than average need, in a country that is roughly three fourths white it is also true that the vast majority of disadvantaged students are nonminority. Neither is there any reason to think that the approach Michael Williams suggests would produce the desired result. In fact, to assume that there is any readily available, equally effective alternative requires one to believe that thousands of college and university administrators, the vast majority of them white, have lightly chosen to ignore such effective alternatives in favor of scholarships based on race.

Absent evidence of "less restrictive" or more "narrowly drawn" alternatives, current minority scholarship programs are the way in which colleges can best use their financial aid to produce diverse student bodies. Therefore, it is fair to conclude that minority scholarship programs are legally permissible means by which postsecondary institutions can advance their compelling interests in achieving racial diversity and remedying past discrimination.

E. THE PRACTICAL CONSEQUENCES OF OCR'S POLICY

Some of the practical consequences of OCR's policy on minority scholarships have already been discussed. There will almost certainly be protracted litigation involving institutions and students across the country. Some postsecondary institutions — the number is impossible to predict — may reduce or eliminate minority scholarship programs rather than face lawsuits. The political debate over minority scholarships will also continue, and Congress may seek to enact legislation protecting minority scholarship programs.

Many educators believe that the controversy over minority scholarships has already damaged higher education in several ways. First, many minority students, believing that scholarship assistance is no longer available to them, may decide not to apply for admission to college.[141] Donald Stewart, president of the College Board, claims that "[t]hrough bitter experience, the College Board has learned that even the discussion of reduced financial aid for college-bound students creates in them the impression that financial aid has already been reduced."[142] According to Professor Michael Olivas, "the damage is far more than most people think....It's left this poisonous residue over the whole process at a time when students are making their decisions about applying to college."[143]

There is also fear that racial tensions will increase on campus. For example, Richard Rosser, president of the National Association of Independent Colleges and Universities, believes that the controversy over minority scholarships "has created the impression that minorities are getting extremely favored treatment....This has inflamed some concerns, particularly on the part of the majority, which are unfounded and are not going to help race relations on campus."[144] Other educators express regret that this issue is likely to eclipse many other issues of importance to minority students.[145] Last but not least, some predict that "[p]ublic confidence in the Education Department's Office for Civil Rights will be so diminished that minority students and faculty members will not file complaints with the office."[146]

Unfortunately, many of these consequences may be felt regardless of how the legal issues are ultimately resolved.

IV. OCR Investigations into Discrimination Against Asian-Americans in Postsecondary Admissions

Michael Williams announced in 1990 that OCR will henceforth focus compliance reviews on possible bias in higher education admissions.[147] Soon thereafter, OCR announced its findings in several Title VI investigations, conducted over a two-year period, into alleged discrimination against Asian-Americans in postsecondary admissions. These investigations, though not based on formal complaints, [148] were prompted by claims that many selective admissions institutions set higher admissions standards for Asian-American applicants than for white applicants.[149]

One institution OCR cleared was Harvard College. OCR's review of undergraduate admissions practices, covering the classes of 1983 through 1992, revealed that Harvard had admitted a higher proportion of white applicants than Asian-American applicants (17.4 percent compared with 13.2 percent) and that the two groups were "similarly qualified."[150]

Under a traditional Title VI effects standard, once disproportionate adverse impact has been demonstrated, the university is obliged to show that the criteria or practices producing the disproportionate impact are educationally necessary or at least valid and nonracial.[151] OCR concluded that there were valid, nonracial justifications for Harvard's admissions policies. It found that the discrepancy in admissions rates was due not to bias on Harvard's part but to the fact that few Asian-Americans benefit from preferential admissions policies that benefit recruited athletes and children of alumni.

Harvard asserted three justifications for its use of preferential admissions for children of alumni: to "encourage alumni volunteer services," to "encourage alumni financial contributions" and to "maintain community relations."[152] OCR accepted these justifications. In a letter to Harvard's president, OCR noted that the policies in question had been adopted "long before there were significant numbers of Asian-Americans at Harvard." "While these preferences have an adverse effect on Asian-Americans," Michael Williams announced, "we determined that they were longstanding and legitimate, and not a pretext for discrimination."[153]

There was a third part to OCR's ruling. Under a Title VI effects analysis, even valid criteria or policies having disproportionate adverse impact may be struck down if there exist equally effective alternative selection standards that produce less disproportionate impact.[154] It is significant, therefore, that "Harvard asserted, and O.C.R. accept[ed], that there are no alternatives to these preferences that could effectively accomplish the same legitimate goals."[155] It is not entirely clear why there should exist no alternative to the use of admissions criteria that disproportionately exclude Asian-Americans and probably other minority applicants as well. A search for such alternatives could produce a different result in another case.

OCR's ruling in the Harvard matter has been defended by development officers at other private universities; one said that alumni admissions preferences are "a fact of life for independent institutions, just as state institutions have to deal with legislatures."[156] The decision has also been criticized, as providing "government sanction to a policy that discriminates,"[157] as hypocritical,[158] and as "affirmative action for the white privileged class."[159] Some will see irony in the fact that OCR, having challenged the legality of minority scholarships (section 4 above), would defend Harvard's alumni preference with the argument that "courts ha[ve] given universities wide discretion in admissions standards."[160]

OCR also investigated admissions at U.C.L.A. In October 1990, it found that U.C.L.A.'s graduate program in mathematics had discriminated against Asian-Americans. According to OCR, there existed "a statistical disparity in the rates of admission to the mathematics department on the basis of race, an inconsistency in how Asian and white applicants who received the same evaluation ratings were treated, and insufficient evidence to show a nondiscriminatory basis for this pattern."[161] OCR directed U.C.L.A. to take steps to insure equal treatment in admissions to the mathematics department, to offer admission to five Asian-American students who had discriminatorly been denied admission, and to keep careful records for three years on admission to the mathematics department. Eight other U.C.L.A. departments, including computer science, architecture and urban planning, were also ordered to maintain and submit careful records on admissions decisions, since their records were too inconclusive to permit OCR to complete its investigation.[162] U.C.L.A. has announced that it rejects OCR's conclusions and will appeal.[163]

At the same time OCR found that 75 departments at

U.C.L.A. had not discriminated in their admissions decisions. OCR's investigation into U.C.L.A.'s undergraduate admissions is still in progress, as are investigations into undergraduate and law school admissions at the University of California at Berkeley.[164]

Some Asian-American leaders have called for further inquiries into possible bias in the admissions process,[165] and OCR has agreed.[166] Among the situations thought to warrant investigation are differing admission rates for white and Asian-American students, sudden changes in the relative weight accorded to academic and nonacademic admissions criteria and new policies on geographic distribution that may hurt applicants from California or Hawaii.[167]

VII. Conclusions and Recommendations

There have been major developments, some troubling, that warrant action to improve minority access to higher education.

First, demographic trends justify greater efforts to improve elementary and secondary educational opportunities for minority students as well as more effective recruitment and retention initiatives at the postsecondary level. On the positive side, as enrollments decline precipitously over the next decade, colleges and universities increasingly will have a powerful new incentive — survival — to attract and retain more minority students.

Second, the entire effort to desegregate previously segregated public systems of higher education and improve opportunities at traditionally black public institutions has been jeopardized by the recent decision of the Fifth Circuit Court of Appeals in *Ayers v. Allain*. The Bush Administration, which had argued for the result reached in that case, has now reconsidered and is seeking Supreme Court review. Everything possible should be done to secure Supreme Court review and reversal.

Third, postsecondary institutions should do far more to prevent and address incidents of racial harassment on campus, and OCR should be encouraged to develop an enforcement strategy in this area. Policies that punish purely verbal harassment should be based on a sensitive balancing of free speech concerns with the compelling interest, reflected in the fourteenth amendment, in ensuring that minority students can study in a climate free of intimidation and abuse. Policymakers should consider a variety of strategies in addition to punishment for combatting racial harassment and making minority students feel welcome on campus.

Fourth, efforts should be made to reverse the Administration's ill-advised new policy on minority scholarships, which has now been withdrawn pending review.

Finally, OCR should be commended for investigating alleged discrimination against Asian-Americans in university admissions.

Chapter VIII

Equal Employment Opportunity

by Helen Norton, with assistance from Sadhna Govindarajulu

I. Introduction

Achieving equal employment opportunity depends upon the leadership of the federal government. Through its legislative agenda, its enforcement and litigation strategies, its ability to coordinate interagency efforts, and its potential role as a model employer, the government has the ability and the responsibility to create nationwide employment policy. And, by demonstrating a steadfast commitment to the goal of equal employment opportunity, it is uniquely positioned to shape the attitudes and policies of employers — both public and private — throughout the country.

In the 1989 edition of *One Nation, Indivisible,* we found that the Reagan Administration had abdicated its leadership in the field of employment rights. Indeed, the Reagan Administration often acted affirmatively to *thwart* equal employment opportunity (EEO) measures. At the dawn of the Bush Administration, we urged the President to adopt an affirmative agenda in support of employment opportunity and to revitalize and strengthen the EEO enforcement agencies that had withered during the Reagan years.

However, little has changed since President Bush's inauguration. To be sure, the Bush Administration has taken a few halting steps in the right direction, as the performance of certain EEO enforcement agencies has improved somewhat. Unfortunately, though, we have yet to see the creation of a comprehensive EEO agenda. Even more troubling, the Administration has actively opposed a number of measures that would significantly advance employment opportunities for women and people of color.

II. The American Workforce

Unfortunately, the government's lack of progress in the arena of equal employment opportunity is readily measurable. Women and people of color still face significant on-the-job discrimination, including sexual and racial harassment, wage discrimination, pregnancy discrimination, occupational segregation, and sex- and race-based stereotyping.

The wage gap offers a painful illustration of the effects of this discrimination. Women still earn only 66% of men's annual earnings. Black men make 74.8% of the earnings of white men; Hispanic men but 65.5%. Women of color suffer from multiple discrimination, as black women receive only 60.7% of white men's earnings; Hispanic women but 54.5%.[1] Not surprisingly, then, women and people of color disproportionately make up America's poor.[2] Our country has not yet achieved its goal of equal justice for all in the workplace.

Furthermore, demographic trends indicate that workplace discrimination is not only unjust, but also inefficient. The last 25 years have brought a revolution in the labor force, as the numbers of working women have skyrocketed. This trend will only intensify, as 5 out of every 8 new entrants to the labor force in the next decade will be women.[3] People of color will make up 29% of the net addition to the labor force during these years — with black women comprising the largest share of the increase in the nonwhite labor force.[4] A sound national employment policy, then, must respond to a labor pool dominated by women and people of color.

The workforce revolution also means that substantial majorities of workers will have significant family responsibilites, given women's high rates of workforce participation, an aging population increasingly in need of care, and the cultural trend towards fathers' greater involvement in childrearing. For example, 72% of mothers with school-aged children are members of the paid workforce.[5] And, at least 20% of the more than 100 million American workers report having caretaking responsibility for an elderly relative.[6] These workers, especially women workers, often suffer decreased earning capacity and shorter job tenure because of their dual work and family responsibilities.

These changes, coupled with the reality of America's shrinking labor pool, demand policies that address the needs of workers with dual work and family obligations. Providing equity and accommodation to those workers struggling with the conflict between their compelling work and family responsibilities is, to be sure, a matter of fundamental fairness. But demographic truths also make clear that the future productivity of the workforce — and, thus, our nation's ability to compete on the world market — depend on resolution of these problems.

The federal government cannot afford to ignore these issues. It must act to advance equal employment opportunity for women and people of color, both to ensure justice for all and to provide the foundation for a sound economy. In this light, the Bush Administration's failure to establish leadership in this area is especially troubling.

III. The Bush Administration's Response to Legislative Initiatives

Now midway through his term, President Bush has been confronted with a number of significant legislative possibilities for expanding equal employment opportunities for women and people of color.[7] With the significant exception of his support for the Americans With Disabilities Act,[8] however, his record in responding to these proposals has too often been extremely disappointing.

A. THE FAMILY AND MEDICAL LEAVE ACT

With his June 1990 veto of the Family and Medical Leave Act (FMLA), the President rejected a crucial piece of legislation that addressed the needs of the American workforce while expanding employment opportunities for women and other workers with pressing family responsibilities. The FMLA simply provides job security to workers who must take unpaid leave to care for their families or for their own serious health conditions. In this way, the FMLA ensures that workers faced with family and medical emergencies need not be forced to choose between their families, their health, and their jobs. In *One Nation, Indivisible,* we urged enactment of just such family and medical leave legislation. Despite expressing support for family leave during the 1988 Presidential campaign,[9] however, the President vetoed the bill.

B. THE CIVIL RIGHTS ACT OF 1990

As discussed in greater detail in another section of this report, the Civil Rights Act of 1990 responded to the wave of disastrous 1989 Supreme Court decisions that eviscerated legal protections against on-the-job discrimination. Just as important, the Act corrected anomalies in existing EEO law, by providing compensatory and punitive damages for victims of gender and religious discrimination — remedies that have been available to victims of race and national origin discrimination for more than 100 years. The Administration's October 1990 veto of this bill represents a critical failure to preserve and strengthen the rights of discrimination victims.

C. COMPREHENSIVE CHILD CARE LEGISLATION

The lack of adequate, affordable child care significantly limits employment opportunities for working parents, especially women. For example, 36% of mothers in families with incomes of less than $15,000 who were not working said they would work if affordable child care were available.[10] Our 1989 recommendations urged passage of comprehensive child care legislation. In the 101st Congress, both the House and Senate responded to this pressing need by passing omnibus child care bills designed to help parents pay the costs of child care and to improve the quality of care.

The heart of this legislation is a program to distribute $2.5 billion to the states to provide child care services directly to families and for direct payments to child care providers. For more than a year, the Administration attacked this approach, claiming that it would lead to a federal child care bureaucracy. Eventually, though, and possibly as a result of the 1990 budget debacle, the White House backed off its veto threat and agreed to a compromise.

D. INCREASES IN THE MINIMUM WAGE

American workers and their families need the support of a minimum wage that allows them to live comfortably above the poverty level. The failure to index the wage to rises in the cost of living saw the hourly wage of $3.35 — established in 1981 — drop to only $2.56 in actual purchasing power. This inaction helped create a class of "working poor" — disproportionately composed of women and people of color[11] — who work full-time yet live in poverty. In 1989, President Bush vetoed the Minimum Wage Restoration Act that would have restored the wage to its 1981 purchasing power. Months later, he begrudgingly agreed to a smaller increase.

E. VOCATIONAL EDUCATION

In a positive move in September 1990, President Bush signed a newly reauthorized Vocational Education Bill, authorizing $1.6 billion for programs designed to serve students unlikely to pursue traditional college education. The bill also strengthens provisions for single parents, displaced homemakers, and sex equity programs.

F. THE DISPLACED HOMEMAKERS' SELF-SUFFICIENCY ASSISTANCE ACT

The United States has an estimated 15.6 million displaced homemakers — women whose long-term roles as homemakers have ended because of divorce or the death or disability of their spouses. Sixty percent of these women are currently unemployed.[12] In October 1990, President Bush signed the Displaced Homemakers Self-Sufficiency Assistance Act, authorizing $35 million to provide assistance to displaced homemakers through job readiness programs, counseling, and other support services to facilitate their entrance into the labor force.

IV. The EEO Enforcement Agencies

Three agencies have primary responsibility for enforcing federal antidiscrimination laws in employment: the Equal

Employment Opportunity Commission (EEOC), the Office of Federal Contract Compliance Programs (OFCCP), and the Department of Justice (DOJ).

While these agencies have shown some improvement since the disastrous Reagan years, the Bush Administration's failure to provide affirmative leadership and to create a comprehensive EEO agenda have limited their effectiveness.

A. THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The EEOC is responsible for enforcing Title VII of the Civil Rights Act of 1964, the Equal Pay Act, the Age Discrimination in Employment Act, and the newly-enacted Americans with Disabilities Act. In addition, under Executive Order 12067, it is responsible for providing leadership and coordination among the federal agencies involved in EEO issues.

1. LEADERSHIP

Effective EEO enforcement depends on committed and experienced leadership, as we pointed out in our 1989 recommendations. In recent months, the EEOC has provided the Bush Administration with several opportunities to act on those recommendations; the President has generally responded by appointing well-qualified candidates.

Following the appointment of former EEOC Chair Clarence Thomas —whose performance as Chair came under heavy criticism by the advocacy community[13] — to the federal bench, EEOC Commissioner Evan Kemp was named to head the Commission. Mr. Kemp has a history of experience with EEO enforcement through his tenure on the Commission and his years as a disability rights advocate.

In October 1990, Joyce Tucker was confirmed to fill the position vacated by Kemp. Ms. Tucker, too, has extensive civil rights experience through her work as director of the Illinois State Department of Human Rights and as chief of the Illinois Department of Mental Health.

EEOC General Counsel Charles Shanor stepped down in June 1990; at this writing, no replacement had been named. Since this position is critical in determining the Commission's litigation strategies, once again it is essential that it be filled by a person strongly committed to EEO enforcement.

2. POLICY DEVELOPMENTS

a. Gender-specific workplace exclusionary policies:

In what one judge called "likely the most important sex discrimination case in any court since 1964,"[14] the Seventh Circuit Court of Appeals upheld an automotive battery plant's practice of excluding women of childbearing capacity from jobs that could expose them to lead, based on the employer's alleged fear of possible harm to any potential fetuses. Ruling on what is becoming an increasingly common practice among employers, the decision threatens to bar millions of women from industrial jobs. The court's analysis was especially disturbing: it approved the exclusion of all women of childbearing capacity regardless of whether they intend to or are likely to have children; it disregarded potential reproductive risks to male workers and their offspring; and it repudiated well-established EEO law by requiring *victims* — rather than perpetrators — of facial sex-based discrimination to prove that the discriminatory policy is unjustifiable — a holding that carries devastating consequences for victims of blatant sex- and race-based discrimination.

Exclusionary policies of this type had become increasingly prevalent during the 1980s. Rather than working to resolve the problem, however, the EEOC only added to it by warehousing over 60 such complaints and by taking weak and contradictory positions in compliance manuals, legal briefs, and in a 1988 policy guidance.[15] After years of prodding by advocacy groups, the EEOC in 1989 finally took a significant first step by attempting to resolve its outstanding "fetal protection" cases (although many of them had to be closed because they had languished for so many years that the agency could no longer locate the charging parties).[16]

However, the EEOC demonstrated a new sensitivity to the problem's severity in January 1990 by issuing a policy guidance that repudiated the Court of Appeals' holding in *Johnson Controls,* instructing EEOC investigative staff outside of the Seventh Circuit to disregard the decision and its reasoning.[17] The guidance instead recognized that established EEO law requires that facially sex-discriminatory policies be analyzed under the stringent BFOQ standard. The EEOC reiterated this position when it filed an amicus brief before the Supreme Court on behalf of the *Johnson Controls* plaintiffs.

Although certainly a step in the right direction, the 1990 policy guidance was not fully adequate for a number of reasons: it left open the possibility that employers may exclude women from jobs involving reproductive hazards under circumstances unrelated to the employee's ability to do the job (thus disregarding the Pregnancy Discrimination Amendment to Title VII and previous EEOC analyses), and it failed to repudiate the flawed and inconsistent 1988 policy guidance on exclusionary policies.

b. Gender-and race-based stereotyping

As more women and people of color have gained entry to the corporate arena, they are often evaluated not on their ability, but on the basis of gender or race — thus creating a "glass ceiling" above which they cannot rise. In our 1989 recommendations, we urged the EEOC to target workplace stereotyping that creates these artificial barriers to the advancement of women and people of color to upper management and leadership positions.

When assuming the EEOC chair, Kemp announced that targeting discrimination against women and minorities in promotions to upper management levels would be one of his highest priorities. In particular, he suggested changing the EEO-1 forms to include questions relating to "glass ceiling" issues. Although the policy pronouncement is a welcome development, it has yet to be fully implemented. We urge the speedy adoption of concrete proposals.

c. Gender-neutral parental leave

In an August 1990 policy guidance, the EEOC made clear that employer policies that treat male and female workers differently when employees request time from work to care for a child or for another family member are illegal sex discrimination under Title VII. This represents an important policy development, since it has been pointed out for years that such a gender-neutral approach to family leave is not only required by Title VII, but that it also discourages on-the-job discrimination against women while enabling men to participate in family care-taking.

d. Sexual harassment

In January 1990, the EEOC issued a new policy guidance on employer liability for favoritism because of sexual relationships. In many respects, the guidance thoughtfully fleshes out the EEOC's 1980 Sexual Harassment Guidelines by further defining the circumstances under which sexual favoritism (whereby employment opportunities or benefits are granted because of an individual's submission to requests for sexual relationships) can support a claim of sex discrimination by other employees. Specifically, it makes clear that both favoritism based on coerced sexual conduct and widespread consensual favoritism may give rise to a third-party claim of sex discrimination. However, the Commission also took the position that isolated instances of preferential treatment based upon consensual sexual relationships do not violate Title VII. Not only is this position unnecessarily limited, it deviates from Title VII's traditional evidentiary framework. Qualified applicants or employees who are denied jobs, promotions, or other employment benefits because of the consensual sexual relationship of another applicant or employee should be able to make a prima facie case of sex discrimination; the employer may defeat liability by showing that it had a legitimate business reason for the employment decision.

In March 1990, the EEOC issued a more comprehensive policy guidance on the developing law of sexual harassment. On the whole, this document too provides thorough and thoughtful guidance to EEOC investigative staff on defining sexual harassment and evaluating evidence of harassment (including determining whether a work environment is sexually "hostile"). Unfortunately, though, the guidance is inconsistent with the 1980 EEOC Guidelines — reiterating a problem in the EEOC's analysis during the Reagan Administration — by suggesting that employers are not necessarily responsible for all harassment committed by their agents and supervisors.

e. Confidentiality of peer review records in discrimination investigations

The EEOC enjoyed a significant litigation victory in *University of Pennsylvania v. EEOC*,[18] where a unanimous Supreme Court agreed that confidential peer review files were not protected from disclosure in an EEOC sex bias investigation. Taking a position in favor of full disclosure that will help discrimination victims prove their cases, the EEOC argued for a strong presumption against allowing an alleged discriminator to pick and choose the information it will supply to investigators. As will be discussed later, this decision may also prove helpful to efforts by the Office of Federal Contract Compliance Programs to eliminate the "glass ceiling" by conducting reviews of corporate succession patterns.

f. Wage discrimination

Women and people of color in the labor force often remain segregated in a few, lower-paid job classifications. Our 1989 recommendations urged the EEOC to pursue this sex- and race-based wage discrimination vigorously. Unfortunately, the EEOC has not yet affirmatively recognized and used wage discrimination as a viable cause of action provable under all Title VII theories. And, as was also true in 1989, the EEOC is not bringing any significant number of Equal Pay Act cases to combat sex-based discrimination — only 7 such cases were filed in FY 1989, down from 79 in 1980, the last full year of the Carter Administration.[19]

In a positive move, the EEOC released a policy guidance instructing its staff that religious institutions are covered by the Equal Pay Act and Title VII with respect to sex bias in wages.

g. Interagency Coordination

In 1989, we urged the EEOC to reassert its leadership role pursuant to Executive Order 12067 — leadership largely usurped by the Department of Justice under the Reagan Administration — to promulgate EEO policies and to coordinate enforcement strategies among the federal agencies. Unfortunately, the EEOC has yet to seize the initiative in this area.

3. EEOC ENFORCEMENT PERFORMANCE

EEOC enforcement statistics suggest that it is slowly but steadily reducing its backlog of charges to 45,987 from its 1987 high of 61,486. However, the EEOC still takes an average of 9.5 months to process charges, far in excess of the 3 to 6.5 months for processing in 1980, the last full year of the Carter Administration.[20]

The EEOC's record for providing favorable case resolution to claimants remains poor. Its settlement rates are low (only 14.7% of charges filed were settled in fiscal year 1990, compared to 32.1% in fiscal year 1980), while no-cause findings are exceptionally high (in 1990, the EEOC found no cause for discrimination in 57.2% of charges filed, *doubling* its no-cause rate of 28.5% in 1980).[21] Concerns remain that the EEOC is sacrificing the quality of its investigations in an effort to reduce its considerable backlog.[22]

Our 1989 recommendations urged the EEOC to make class action litigation attacking systemic discrimination a priority — a tactic proven to maximize limited resources for greatest effect. However, despite record increases in the total number of cases filed — 486 in FY 1989, up from 326 in FY 1980 — the EEOC has persistently failed to engage in classwide actions, focusing instead on litigating individual claims. The EEOC filed only 94 class action cases in 1989, down from 218 in 1980.[23] However, in a significant enforcement development, a November 1990 policy guidance announced that the EEOC will boost law enforcement efforts by using information from "testers" to detect illegal job discrimination. Testers, who apply for employment with the sole purpose of obtaining information as to any discriminatory hiring practices, can both prove the existence of discrimination and act to deter it. Testers have proved very successful in battling housing discrimination. Under its new policy guidance, the EEOC will accept charges filed by civil rights and community organizations on behalf of testers.

4. RECOMMENDATIONS FOR THE EEOC

- Pursuant to Executive Order 12067, the EEOC should reassert its leadership role in policymaking and coordinating federal EEO activities.

- The EEOC must substantially increase its use of litigation to reduce systemic discrimination — utilizing task forces and identification procedures, coordinating efforts with the Departments of Justice and Labor, and consulting with advocates for women's and civil rights. It should target industries for closer appraisal, for example, by reviewing EEO-1 forms and reports submitted to the OFCCP, the Securities Exchange Commission, and other government agencies, checking for underrepresentation in the workforce by women and people of color. The EEOC's new policy on testers should help significantly in any systemic efforts.

- The EEOC must continue to regularly foster the exchange of ideas and recommendations among top government EEO policymakers and advocates for women's and civil rights.

- The EEOC should publicly and explicitly reaffirm its support for the use of goals and timetables in expanding equal employment opportunity. And, it should ensure that such measures are included in its settlement agreements wherever appropriate.

- The EEOC should support, and urge the Administration to support, the principles embodied in the Civil Rights Act of 1991.

- The EEOC should reduce its charge processing time and its backlog of charges by hiring additional staff and initiating comprehensive personnel training. Of course, this depends in large part upon receiving adequate funding from the Administration and Congress.

- The EEOC should adopt — and make available to employers and employees — interpretive policy that advances equal employment opportunity in the following areas:

Workplace exclusionary policies: The EEOC should take a leadership role in the enforcement of Title VII with respect to gender-discriminatory "fetal protection" policies. It should issue policy guidance to employers, employees, and labor organizations, as well as to its investigative staff, making clear that explicit sex-based exclusions are always unlawful — even if part of a good-faith desire to protect health — and outlining the circumstances in which sex-neutral exclusions might be lawful even if they have a disparate impact on women. The EEOC should expedite the investigation, processing, litigation, and resolution of these complaints. Furthermore, it should actively promote additional research on workplace reproductive hazards, taking steps to eliminate the gender bias evident in existing research. Finally, the EEOC should coordinate Title VII enforcement with other federal agencies — such as the Occupational Safety and Health Administration, the Environmental Protection Agency, and the Nuclear Regulatory Commission — to ensure gender-neutral workplace regulations and to encourage safer workplaces for all.

Sexual harassment: Just as employers are held liable for race or sex discrimination committed by their supervisors, the EEOC should make clear that employers are liable under Title VII for sexual harassment committed by their supervisors or agents — including harassment that takes the form of creating a hostile or offensive work environment. The EEOC should also extend and modify its policy guidance on sexual favoritism by recognizing that isolated instances of such favoritism may give rise to a prima facie claim of sex discrimination by applicants or employees passed over for employment opportunities.

Wage discrimination: The EEOC should recognize gender- and race-based wage discrimination as a viable theory provable under all Title VII methods. Along with developing guidance for enforcement staff and for other EEO agencies on how to handle such claims, the Commission should bring and litigate many more wage discrimination cases. Included in this effort should be more Equal Pay Act claims.

B. OFFICE OF FEDERAL CONTRACT COMPLIANCE PROGRAMS

The OFCCP is part of the Labor Department's Employment Standards Administration. It implements Executive Order 11246, as amended, which prohibits discrimination by federal contractors on the basis of sex, race, religion, or national origin, and requires contractors to take affirmative action to ensure equal employment opportunity. When effectively enforced, the Executive Order's affirmative action requirement is a tremendous tool for expanding employment opportunities for women and people of color. For example, in the late 1970s, the OFCCP targeted the coal mining industry for enforcement focus, achieving dramatic gains in women's employment. In 1983, no women were employed in the coal mining industry; by December 1980, 3,295 women were so employed.[24]

1. LEADERSHIP

As discussed below, OFCCP enforcement has improved significantly with the July 1989 appointment of Cari Dominguez as director, along with the ongoing leadership of former Secretary of Labor Elizabeth Dole. Given Ms. Dominguez' prior experience both with the OFCCP and as a private-sector EEO officer, her appointment underscores the importance of committed and experienced leadership to effective EEO enforcement. As of this writing, Ms. Dole had resigned as Secretary and former Representative Lynn Martin had been nominated as her replacement. Ms. Martin has no significant EEO background, and it is unclear whether she plans to continue the initiatives begun by Ms. Dole.

2. POLICY DEVELOPMENT

a. The "glass ceiling"

Our 1989 recommendations urged the OFCCP to target the "glass ceiling" problem, whereby women and people of color are denied access to leadership positions because of discriminatory on-the-job stereotyping. Since that time, Ms. Dominguez has developed a comprehensive "glass ceiling" initiative. This initiative calls for restructuring the OFCCP's compliance review program to examine — for the first time — corporate succession plans to see how employees are selected for key high-level corporate jobs. This initiative includes increased attention to the effects of family responsibilities on careers — examining whether "mommy track" principles are used to discriminate against women workers or to support their full participation in the workforce. It also requires examining corporate practices for selecting employees for executive development programs, succession plans, the structure of compensation packages, training and rotational assignments, and recruiting methods. However, it appears that the progress of this commendable initiative has been halted pending confirmation of the new Secretary of Labor.

b. Women in the skilled trades

In November 1990, former Secretary Dole unveiled an initiative to support women in the skilled trades (for example, electricians and carpenters in the public utilities, manufacturing, and construction industries). Recognizing that most women are segregated into traditionally "female" occupations that carry lower wages, Dole targeted increased recruitment and retention of women in the higher-paying trades. Her initiative would include OFCCP enforcement and education programs designed to knock down the barriers that have kept women from entering and competing in the skilled trades.

In August 1990, Dominguez also announced plans for targeting the employment of women in the construction industry. Given this industry's deplorable record in hiring and training female employees, the OFCCP's announcement is an encouraging development; we urge its speedy implementation.

3. LITIGATION

The OFCCP is currently involved in defending its ability to enforce Executive Order compliance by large entities — like universities — that receive many federal contracts among their various constituent branches. In *Board of Governors of the University of North Carolina v. Department of Labor*, the University of North Carolina — a federal contractor — challenged the OFCCP's authority to conduct on-site compliance reviews at two of its branch campuses that have no federal contracts. In resisting OFCCP review, the university argued that its 16 branches are *separate* entities for purposes of the Executive Order's requirements. In a case that carries far-reaching consequences for its ability to enforce the Executive Order effectively (especially among large institutions), the OFCCP has consistently maintained that all branches of a single entity are subject to OFCCP review if any one receives a government contract. The OFCCP scored a significant victory when the Fourth Circuit Court of Appeals found that North Carolina state law made clear that the University is indeed a single state entity, requiring even non-contracting campuses to submit to OFCCP compliance reviews.[25]

The OFCCP's enforcement authority is at stake in another piece of significant litigation as well. In *Stouffer Foods Corp. v. Dole*, an employer has alleged that Executive Order 11426 (imposing EEO and affirmative action obligations upon federal contractors) was issued without constitutional or statutory authority and that its affirmative action requirements are unconstitutional and in violation of Title VII.[26] Currently awaiting consideration at the district court in South Carolina, the case offers the OFCCP and the Department of Justice the opportunity to repudiate the government's Reagan-era stance against affirmative action.

4. ENFORCEMENT PERFORMANCE

The OFCCP's statistical performance was markedly improved in 1989 and 1990. Because of its efforts, 6,634 individuals enjoyed a record recovery of $21.6 million in back pay in 1989 — including a record $14 million settlement from Harris Bank. In 1990, the Office completed a record number of conciliation agreements (2,855).

In terms of its overall litigation efforts, the OFCCP filed 41 administrative complaints in 1989, but only 21 in 1990; in comparison, the Office filed 53 during the last full year of the Carter Administration.[27]

5. RECOMMENDATIONS FOR THE OFCCP

- The new Secretary of Labor must continue the initiatives begun under Secretary Dole — especially those addressing the "glass ceiling" and women in the skilled trades.
- The new Secretary should also announce support for the Family and Medical Leave Act as a necessary means of expanding employment opportunities for women and other workers with significant family caretaking responsibilities.
- The OFCCP must bolster its efforts at enforcement through litigation. For example, it should return to its strategy — proven effective by past experience — of targeting industries for special investigations by using "strike forces" made up of investigative staff and representatives from the office of the Solicitor of Labor. The Solicitor's office should be more integrally involved at an early stage in the investigation of complaints, since such involvement facilitates appropriate settlement, and encourages well-crafted litigation when settlement is not possible. Similarly, the Solicitor's office should be available for consultation during compliance reviews. And, its sluggish pace in filing administrative complaints in 1990 calls for a return to its previous, more aggressive rate of filing complaints.
- The Office should seize the opportunities presented by the *Stouffer* and *UNC* cases (and in any similar challenges) to reaffirm its commitment to affirmative action goals and timetables as critically important tools in EEO enforcement.
- To promote true equal employment opportunity, the OFCCP should consider the following as evidence of good-faith efforts when evaluating contractors' compliance with the Executive Order: explicit guarantees of family and medical leave to all employees; provision of on-site child care or child care subsidies; provision of elder care benefits; use of alternative work arrangements; completion and implementation of pay equity studies. Moreover, in addition to affirmative action recruiting and hiring programs that include goals and timetables, the Office should promote employer-provided or employer-financed affirmative job training and education programs to develop skills among women and people of color in areas traditionally excluded to them.
- As part of its announced plans to target the construction industry's employment practices — and in light of the increased percentage of women in the workforce who are interested in and available for construction jobs — the agency should increase its goal of 6.9% for women in the construction trades. This goal should be established for individual crafts rather than on an industry-wide basis.
- The OFCCP should undertake a comprehensive review of its regulations to see if they need revision or updating; this process should include consultation with groups representing employees and contractors.

C. DEPARTMENT OF JUSTICE

Title VII authorizes the Attorney General to initiate civil litigation to redress employment discrimination by units of state and local government. The Department is also authorized to bring litigation against federal contractors. Under the Reagan Administration, the Department's Civil Rights Division exerted considerable influence over EEO policy, only to use its power to adopt policies retreated significantly from well-established civil rights law.[28]

1. LEADERSHIP

Until John Dunne's confirmation in March 1990, the post of Assistant Attorney General for Civil Rights remained empty for more than a year. Although we urged that any nominee for this important position demonstrate significant experience in and commitment to civil rights enforcement, neither of the President's nominations — Dunne and William Lucas, whose nomination was withdrawn after vigorous opposition from women's and civil rights' groups — possessed these qualities. And, as Assistant Attorney General, Dunne's commitment to equal employment has been called into question through his work in opposing the Civil Rights Act of 1990 (discussed more extensively in another section).

2. POLICY DEVELOPMENT AND ENFORCEMENT

Perhaps because it operated for so long without leadership, the Department has yet to develop an affirmative EEO agenda of any kind under the Bush Administration. It has done very little in the way of policy development and enforcement efforts, nor has it created a coherent litigation strategy.

However, in a disturbing throwback to its Reagan-era stance on affirmative action, the Department filed an amicus brief attacking a Federal Communications Commission affirmative action policy in *Metro Broadcasting, Inc. v.*

Federal Communications Commission.[29] The FCC's "distress sale" policy allows a broadcaster whose licensing qualifications have come into question to transfer the license to a minority enterprise before an FCC hearing resolves the matter. The Department argued that the policy violated the Constitution's equal protection clause by creating a preference available only to businesses operated by people of color.

And, as discussed extensively in another section, the Department of Justice has actively opposed passage of the Civil Rights Act of 1990 — for example, by testifying against it before congressional committees in both the House and the Senate.

3. RECOMMENDATIONS FOR THE DOJ

- The Department of Justice must publicly repudiate its Reagan-era position on affirmative action and basic civil rights principles. Instead, it must establish an affirmative agenda in battling employment discrimination, including support for the use of goals and timetables.
- The Department of Justice should aggressively assert its authority to enforce EEO laws against federal contractors. As it did in past administrations, the Civil Rights Division should aggressively pursue innovative remedial action on behalf of women and people of color. In addition to affirmative action recruiting and hiring programs that include goals and timetables, the Division should promote employer-provided or employer-financed affirmative job training and education programs in order to develop skills among women and people of color in areas traditionally barred to them.
- The DOJ needs to initiate more cases against sex- and race-based wage discrimination in the public sector. State and local governments traditionally employ large numbers of women and people of color who are, however, often disproportionately excluded from certain positions — such as those in police forces and fire departments — and disproportionately concentrated in low-paying jobs. For these reasons, the DOJ should include among its targeted investigative and litigation initiatives the employment and wage practices of state and local governments with respect to these particular occupations.

V. The Government as Model Employer

With over three million civilian employees, the federal government is the nation's largest employer. Nearly half of its workers are women; more than a quarter are people of color. For these reasons, the government's employment policies — and its willingness to police its own efforts to ensure equal employment opportunity — are of critical importance in setting the stage for employment policies across the nation.

A. EEO ENFORCEMENT FOR FEDERAL EMPLOYEES[30]

Federal employees who claim to be victims of discrimination must use an EEO claims processing system entirely separate from that available to private-sector employees. Under this system, a federal employee with a discrimination claim must wade through a complex administrative process while complying with strict deadlines — or risk losing her right to relief. The federal agency charged with discrimination, on the other hand, operates under very lenient or even no timeframes, often making for lengthy delays — for example, in 1985 the median time for processing a complaint to closure was 845 days.[31] Under this system, the federal agency charged with discrimination is also responsible for initial investigation of the claim — creating an obvious conflict of interest that generally works against an aggrieved employee.

In the words of former EEOC chair Clarence Thomas, the current federal EEO complaint process "is ineffective, unnecessarily time-consuming, and ten times more costly than the processing of private employer charges."[32] Thus the process for resolving discrimination claims by federal employees represents a major impediment to the government's ability to fulfill its commitment to ensuring equal employment opportunity even among its own employees.

The EEOC and advocates alike agree that reform of the federal sector's EEO system is necessary. In 1989, the EEOC proposed reform through regulatory action. However, these proposed regulations met with considerable criticism by many employment rights advocates who argued for more comprehensive reform.[33]

For example, the proposed regulations failed to provide for a much-needed extension of time for the filing of an EEO complaint, allowing a complainant time to consider whether they want to file a complaint and to consult with an attorney. They also failed to make absolutely clear that an aggrieved employee has a right to an administrative hearing. Third, the proposal unnecessarily undermined the legitimacy of the administrative judge's findings and conclusions by making them merely "recommended;" advocates urged instead that the administrative judge's findings and conclusions be final and enforceable unless appealed. The regulations have yet to be finalized. At the same time, legislative proposals have also been discussed by members of Congress and the advocacy community.

Advocates also urge that any reform — either regulatory or legislative — of the federal EEO complaint processing process contain provisions to ensure timely resolution of employees' complaints, as well as mechanisms to eliminate the conflict of interest created when the agency charged with discrimination is also entrusted with investigation of the complaint.

B. OTHER WORKPLACE POLICIES

By becoming a model employer — adopting workplace policies that are fair and creative — the federal government is uniquely positioned to influence employment practices in both the public and private sectors. In so doing, it should recognize that, in addition to traditional EEO concerns about race- and gender-based discrimination, many employees have family responsibilities that must be addressed as a matter of policy. In addition to reforming the federal EEO complaint processing system, as discussed above, we recommend the following:

- The government must make clear that, as an employer, it will not tolerate discrimination. Thus, agency heads must make the eradication of workplace discrimination a high priority — and agency heads should be evaluated in part by their success in reducing discrimination.
- Each agency should immediately adopt and begin to implement an affirmative action plan, including goals and timetables for hiring and promotion of women and people of color to positions in which they have previously been underrepresented.
- Each government agency should undertake a study of its wage practices; salary disparities based on sex or race should be corrected.
- The federal government should provide its employees with programs to support working families — including paid family and medical leave, child care, and alternative work scheduling.

VI. Summary and General Recommendations

Because the Bush Administration has made little progress in the area of equal employment opportunity, we must repeat many of these general recommendations that we made in 1989.

1. First and foremost, the federal government must make a forthright commitment to tough, vigorous, and effective EEO enforcement. This commitment must include a strong public message that equal employment opportunity is a top priority, including an explicit repudiation of the EEO positions of the Reagan Administration.

2. The Administration should support the following legislative proposals critical to ensuring and expanding equal opportunity:

— the Family and Medical Leave Act of 1991

— the Civil Rights Act of 1991

— the Nontraditional Employment for Women Act (authorizing funds to states to develop and expand special job training programs for women — typically targeting nontraditional occupations like construction and truck driving).

3. Effective EEO enforcement depends on committed leadership. The Bush Administration must fill top-level positions with experienced individuals committed to the enforcement of EEO laws.

4. The Administration should ensure that the funds required to implement an effective EEO enforcement policy are included in the federal budget.

5. Given adequate funding, the EEO agencies must generally improve their enforcement performance. They should file more complaints, litigate more cases, and reduce their backlogs and charge processing time. Aggressive, committed enforcement efforts are critical in translating the ideal of equal employment opportunity into reality.

6. Each federal government agency should show unequivocal support for enforcement tools that have proven fair and effective — such as affirmative action goals and timetables and disparate impact analyses of discrimination. Arguments about "quotas" and "reverse discrimination" serve only to divert attention from the real problem — the need to take *positive* measures to break down institutional patterns of discrimination.

7. The EEO enforcement agencies should develop national operating plans that set forth basic principles to guide their respective enforcement and litigation efforts — addressing, for example, the recommendations contained in this report. The plans should be published annually and should include both yearly and long-range (e.g., five-year) goals for performance and policies. Among other things, the plans should include assessments of the resources that will be needed to implement the priorities within designated timeframes, along with status reports on the availability of such resources and of requests for resources to Congress.

8. The EEOC, OFCCP, and DOJ should develop a coordinated enforcement strategy to target those companies and industries with a history of discrimination. In their enforcement and litigation efforts, the agencies should aggressively and creatively challenge the following discriminatory practices that remain prevalent:

— multiple discrimination against women of color;

— policies that have a disparate impact on women and people of color (for example, strength tests that disproportionately and unnecessarily exclude women from certain jobs);

— gender- and race-based wage discrimination;

— occupational segregation, including exclusionary policies based on reproductive health hazards;

— gender- and race-based stereotyping that too often create a "glass ceiling" impeding access to top management positions;

— pregnancy discrimination; and

— sexual and racial harassment.

9. Furthermore, the executive branch should coordinate cross-cutting enforcement strategies by diverse agencies — targeting discrete geographical areas, industries, and occupations where sex and race discrimination in employment are most egregious. For example, the Department of Housing and Urban Affairs' mandate to ensure fair housing can be used to provide safe and affordable housing to women and people of

color in residential areas easily accessible to the plants and industries targeted for enforcement by the EEOC.

10. The EEO agencies should incorporate creative training programs into affirmative action programs and other remedies for discrimination. Programs should emphasize assistance for unskilled, underskilled, and displaced workers. Training programs must be structured to allow participation by workers with family responsibilities — for example, by including child care.

VII. Conclusion

As the 1990s begin, America needs a new and responsive employment policy that meets the challenges of the world economy and addresses the requirements and characteristics of the available workforce.

Clearly, the basic principle of existing EEO policy — that all workers should be treated equally regardless of gender, race, or ethnic origin — must remain an essential underpinning of employment policy. Sex, race, and ethnicity discrimination must be eliminated if skilled workers are to be hired and promoted on the basis of merit, not on unfair and irrelevant characteristics. Wage discrimination must be eliminated if jobs of the year 2000 — jobs that require higher skill levels — are to be filled with skilled workers. Sexual and racial harassment must be eliminated if workers are to retain their jobs and remain productive. Pregnancy discrimination and other forms of discrimination based on workers' family responsibilities must be eradicated if our economy is to respond effectively to the changing composition of its workforce.

The federal government must be actively engaged in evaluating existing employment policy and planning for the employment policy of the future. It must provide energetic leadership on equal employment opportunity.

To date, the Bush Administration has been slow to accept its responsibility in this area. Although it has made some visible improvement since the Reagan years, on a number of occasions it has actively opposed measures to ensure and expand equal employment opportunity. We urge the Administration to reconsider its position on these issues and to engage itself in the development of an affirmative agenda dedicated to the attainment of equal employment opportunity.

Chapter IX
Employment Rights of Older Americans

by Christopher G. Mackaronis

I. Introduction

During the decade of the '80s, while occurrences of age discrimination in employment increased precipitously, the federal civil rights enforcement agencies consciously pursued a policy of benign neglect for the rights of older workers. Investigatory practices focusing on individual victims rather than class-based discrimination were fraught with delays that often compromised the complainant's ability to effectively pursue legal action. Regulatory decision-making initiatives showed a marked tendency towards relaxing, rather than strengthening, the prohibitions of the ADEA1 in several critical areas. Finally, in the area of litigation enforcement, the EEOC (1) shied away from large class-based discrimination, (2) conspicuously avoided any litigation involving early retirement incentive programs, and (3) advanced pro-employer positions in cases involving controversial and important legal issues. *See One Nation, Indivisible: The Civil Rights Challenge for the 1990s*, Report of the Citizens' Commission on Civil Rights at 180-187.

With this background of eight years of progressive non-enforcement of the ADEA,[1] the Bush Administration was presented with a tailor-made opportunity to distinguish itself from the preceding Administration and demonstrate a renewed commitment to the active enforcement of the ADEA. This opportunity took on substantial significance in the wake of the Supreme Court's decision in *Public Employees' Retirement System of Ohio v. Betts*, 109 S. Ct. 2854 (1989). Faced with a unique opportunity to demonstrate an invigorated effort on behalf of older workers, the Administration's response to the *Betts* decision cast tremendous doubts on its credibility and willingness to pay more than lip-service to the protection afforded older workers by the ADEA.

A. THE *BETTS* DECISION

The *Betts* decision has had a drastic effect on settled principles of employment discrimination law affecting older Americans. As a result of *Betts*, employers unquestionably had far greater latitude than ever before to discriminate in the terms and conditions of a broad range of employee benefit plans.

The plaintiff, June M. Betts, had been employed by the Hamilton County Board of Mental Retardation and Developmental Disabilities and, as such, was participating in the Public Employees Retirement System of Ohio ("PERS"). Betts became totally disabled at age sixty one (61) and subsequently applied for disability retirement under PERS. Her application for disability retirement benefits was denied solely on the ground that she was over age sixty (60) at the time of her disability. As a consequence, Betts was received a standard age and service pension of $158 per month as opposed to the more generous $355 per month disability retirement she would have received had she been younger.[2] Betts filed charges under the ADEA and then sued in federal district court.

Both the district court and the Sixth Circuit Court of Appeals ruled in Betts' favor on her claims. The Sixth Circuit found the age-based exclusion of the plaintiff from disability retirement benefits to be unlawful "unless it [the exclusion] falls within the bona fide employee benefit plan exception of 29 U.S.C. § 623(f)(2)."[3] Relying on Interpretive Regulations issued by the Department of Labor in 1979,[4] the Court held that "where, as in the present case, the employer uses age — not cost, or years of service or salary — as the basis for varying retirement benefits, he had better be able to prove a close correlation between age and cost if he wants to shelter in the safe harbor of [29 U.S.C. § 623 (f)(2)]."[5] Since the state had provided no evidence or economic justification for the exclusion of employees over age 60, the Court affirmed the grant of summary judgment for *Betts*.[6]

The Supreme Court reversed, and in the process upset several settled principles of law applicable to benefits discrimination claims under the ADEA. First, the Court concluded in *Betts* that the phrase "compensation, terms, conditions, or privileges of employment" set forth in § 4(a)(1) of the ADEA did not encompass employee benefit plans. The Court's conclusion in this regard was perhaps the most startling aspect of the *Betts* decision because it reflected a measured amount of disregard both for the language of the ADEA and the Court's prior decisions under Title VII. Indeed, the Court itself long ago recognized that the substantive provisions of the ADEA were taken in haec verba from Title VII. Moreover, in a variety of Title VII cases, the Court had already interpreted the identical language in Title VII as applicable to discrimination in employee benefit plans.

Second, the Court rejected the unanimous judgment of the courts of appeals that § 4(f)(2)[7] constituted an affirmative defense — a defense for which the employer bore the burden of proof.[8] Rather than constitute an affirmative defense, the Court concluded that the requirements of § 4(f)(2) formed part of an employee's prima facie case.

Third, the Court concluded that in order to establish a violation of § 4(f)(2), an employee must show not only that an employee benefit plan discriminates on the basis of age in the provision of employee benefits, but also that the challenged discrimination was intended to serve the purpose of discriminating in some nonfringe-benefit aspect of the employment relation. The Court's new formulation of the plaintiff's burden in an employee benefits case — overt discrimination in employee benefits plus an intent to discriminate in nonfringe-benefits — was inconsistent with the standard previously applied by all the courts of appeals in addressing claims of benefits discrimination under the ADEA.

Fourth, the Court rejected the Administration's regulations, in effect since 1969,[9] which required an employer attempting to justify an age-related reduction in benefits to prove that the cost of the benefits increased based on age. Although the regulations had formed the cornerstone for many successful cases pursued by the EEOC, and although the regulations were supported by employer organizations, the Court invalidated the requirement that an employer had to prove a valid cost-justification for a reduction in benefits.

Finally, the Court affirmed its decision in *United Airlines, Inc. v. McMann*, 434 U.S. 192 (1977), that an employee benefit plan that pre-dated the ADEA could not be a subterfuge to evade the Act or its purposes. As a result of this aspect of the Court's holding, any discriminatory employee benefit practice that was instituted prior to the enactment of the ADEA and which had remained unchanged thereafter would have been immunized from challenge under the ADEA.

B. THE ADMINISTRATION'S RESPONSE TO BETTS

Almost immediately after the decision in *Betts*, corrective legislation was introduced in both the Senate and the House of Representatives designed to overturn *Betts* and restore the law and regulations in effect before the decision was issued. Identical bills were introduced in the Senate (S. 1511) and in the House of Representatives (H.R. 3200) in the early part of August 1989. Hearings on both bills were conducted the following month. At these hearings, both the Vice-Chairman and the General Counsel of the EEOC testified in favor of legislation designed to overturn *Betts*. Specifically, EEOC Vice Chairman R. Gaull Silberman testified that the EEOC supported S. 1511 and H.R. 3200 with one exception, the "addition of language that will preserve voluntary early retirement incentive programs . . . "[10]

During the ensuing months of legislative deliberations, officials from the EEOC, the Department of Labor, and the Treasury Department met frequently with congressional staff in both the Senate and the House to discuss (and finalize) the pending legislation. During these numerous meetings, no effort was made by the Administration officials to raise any concerns other than those originally raised by the EEOC regarding the standards for judging early retirement incentive programs.[11]

S. 1511 was marked up and reported out of committee on February 28, 1990. Similarly, in the House of Representatives, H.R. 3200 was favorably reported out of committee on April 4, 1990. On March 27, 1990, the Administration, through Roger B. Porter, forwarded extensive comments on the pending legislation to Congressman William P. Goodling.[12] The views expressed by the Administration in its March 27, 1990 communication to Congress represented an abrupt about-face in the Administration's support for the pending legislation. The Administration expressed numerous reservations regarding the substance of the pending legislation, none of which had been raised previously. More importantly, none of the reservations expressed in the Administration's March 27, 1990 letter to Congress were consistent with prior administrative enforcement policy, the position taken by the Administration in the *Betts* litigation, or twenty years of administrative regulations, including those supported by the Reagan and Bush Administrations.

First, the Administration repudiated the testimony of EEOC Vice Chair Silberman on the issue of early retirement incentive programs under the ADEA. Silberman's testimony, upon which Congress relied in ensuing negotiations, sought the addition of language that would preserve voluntary early retirement incentive programs "which further the purposes of the ADEA."[13] During months of ensuing negotiations, the EEOC steadfastly adhered to this language as the *only* acceptable language regarding early retirement incentive benefits under the ADEA. In reliance on this position, congressional negotiators ultimately incorporated the EEOC's requested language into the bill.[14] The Administration's letter of March 27, 1990 constituted an unprecedented repudiation of its own officials.[15]

Second, on the eve of consideration of the bill by the full House of Representatives, the Administration insisted that the bill provide for the coordination of severance and retirement benefits under the ADEA. The Administration's belated comments in this regard were (1) inconsistent with long standing federal regulations which prohibited the integration of severance pay and retirement benefits, (2) the views of every federal court of appeals which had addressed the issue under the ADEA, (3) the Administration's brief in the *Betts* case, and (4) the Administration's previous testimony on H.R. 3200 and S. 1511.

Third, the Administration rescinded its previous unqualified support for the retroactivity provisions contained in the pending legislation. This reversal of position was particularly startling in light of the existence of approximately thirty (30) cases which could be adversely affected by the decision in *Betts*.[16]

Fourth, the Administration expressed support, for the first time, of a delayed effective date provision as it applied to state and local governments.

C. THE OLDER WORKERS BENEFIT PROTECTION ACT (OWBPA)

Because of the Administration's numerous eleventh-hour objections, the *Betts* legislation took a laborious path to passage after the bill was favorably reported out of appropriate House and Senate committees. Ultimately, a compromise substitute was introduced and passed in the Senate on September 28, 1990 and in the House of Representatives on October 4. The Older Workers Benefit Protection Act (Pub. L. 101-433), was signed into law by President Bush on October 16, 1990.

The final version of the Older Workers Benefit Protection Act constituted a substantial compromise from the previous versions of legislation and, in certain respects, overturned, rather than restored, the law that existed prior to the time *Betts* was decided.

First, the new amendments permit employers, for the first time, to offset disability benefits by pension benefits for which a disabled individual is *eligible*.[17] This provision, supported by the Administration, is directly inconsistent with the government's long-standing regulations regarding disability benefits. In practical effect, an older employee, faced with the prospect of a disability offset for pension benefits for which he is eligible, will likely elect to receive retirement pay rather than forfeit it by way of an offset. For all practical purposes, this provision could cause the involuntary retirement of many disabled older workers.

Second, the amendments specifically permit employers to offset against severance benefits certain pension benefits payable upon plant closing or termination.[18] This practice, specifically, condemned by the Administration's own regulations, had been rejected by numerous courts of appeals and was not implicated by the *Betts* decision. Nevertheless, the Administration's preference for this provision was critical to its support for the legislation.

Third, the amendments make it lawful for an employer to observe the terms of a bona fide early retirement incentive plan which is consistent with a purpose or a relevant purpose of the ADEA. This provision, advocated by the Administration, represents a far less stringent standard of compliance than that set forth in the bills which were favorably reported out of committee — bills to which the EEOC had given its support.[19]

Fourth, not only were the amendments not retroactive as originally introduced, they did not become effective until one hundred and eighty (180) days after enactment of the legislation itself. The prospective application of the amendments substantially undermined many of the government's own cases regarding discriminatory employee benefits, as well as substantial private litigation which otherwise would have been preserved.

II. Administrative Practices Continue to Compromise ADEA Enforcement

During the first two years of the Bush Administration, few significant changes appeared to have been made in the manner in which the EEOC administratively processed complaints of age discrimination. As a result, processing delays, litigation strategies, and non-disclosure policies have all contributed to the EEOC's continued inefficiency.

A. DELAYS IN COMPLAINT PROCESSING PERSIST

The Commission continues to be unable to efficiently process complaints alleging unlawful age discrimination in employment. Unjustified delays in more than 7,000 cases caused Congress to enact the Age Discrimination Claims Assistance Act of 1988.[20]

Continued delays have caused Congress to pass the Age Discrimination Claims Assistance Act of 1990.[21] The purpose of both statutes was to provide an extended filing period for individuals whose statutes of limitations had expired while their charges were under investigation at the EEOC.

Otherwise, the Commission does not appear to have taken any focused action designed to ameliorate the problems identified in *One Nation, Indivisible:* (1) undue delays in processing charges; (2) closed cases without full investigations; and (3) an increase in the backlog of unsettled cases.

B. CONTINUED DENIAL OF INFORMATION TO CHARGING PARTIES

The EEOC continues to engage in two procedures which substantially compromise a complainant's ability to effectively pursue an ADEA claim. First, the Commission continues to adhere to its administrative policy of not disclosing to the complainant the position taken by the respondent to the charge. This policy impairs the complainant's ability to accurately assess the merits of the claim and make a realistic judgment regarding pursuit in federal court.

Second, the EEOC has adopted no policies by which it can provide effective notice to potential class members of an existing ADEA lawsuit against the same defendant. The Commission's refusal to implement procedures in this regard is particularly unjustified in light of the Supreme Court's holding in *Hoffman-LaRoche, Inc. v. Sperling,* 110 S. Ct.482 (1989). In *Sperling,* the Court concluded that it was appropriate for the federal courts to provide notice to all those individuals "similarly situated" to the complainant in the litigation in order to provide them an effective opportunity to opt in to the litigation pursuant to the provisions of the Fair Labor Standards Act (FLSA). Procedures by which the EEOC would notify all affected individuals of their right to (1) initiate litigation based on a timely ADEA charge, or (2) opt in to litigation already pending, would facilitate more aggressive ADEA enforcement and would substantially reduce the cost involved for private litigants attempting to pursue their claims.

III. Regulatory Policy and Litigation Concerning ADEA Enforcement

A. REGULATORY ACTIONS

There has been no perceptible change in the regulatory approach by the Commission during the first two years of the Bush Administration. Of most relevance is the passage of the Older Workers Benefit Protection Act. Title II of those amendments establish the statutory criteria by which employees can execute valid and binding waivers of their rights under the ADEA. The amendments provided a detailed and comprehensive scheme for notice and an adequate opportunity to examine the waiver to effectuate a truly knowing and voluntary waiver. The original purpose of the waiver amendments was to overturn the Commission's rule-making initiative which, at the time of its inception, permitted an employee to execute an ADEA waiver under a standard that was far more relaxed than that originally set forth in the Fair Labor Standards Act. The waiver amendments contained in the Older Workers Benefit Protection Act specifically (and permanently) rescind the EEOC's waiver regulations.

B. LITIGATION

During the first two years of the Bush Administration, the Commission did not alter perceptibly its litigation strategy under the ADEA. While the raw number of suits filed in 1989 (134) represented an increase from the 106 cases filed in 1988, it represented only a modest 55% increase over the number of ADEA suits filed in 1981.

The Commission's litigation strategy in the benefits cases in which the Commission was involved after the *Betts* decision raised troubling questions concerning the Commission's commitment to protect the interest of older workers. While the Commission's General Counsel testified in September 1989 that the Commission had approximately thirty (30) suits impacted by *Betts*,[22] the Commission took only selective action in those cases following the *Betts* decision. In one of the Commission's cases, *Abenante v. Fulflex*, No. 89-1179 (1st Cir. 1989), the Commission actively sought voluntary dismissal of the litigation *before* ever moving to hold the case in abeyance pending the outcome of the *Betts* legislation.

Perhaps more troubling, the Commission's testimony to the Congress regarding its efforts to avoid dismissal in light of *Betts* was less than candid. In testimony before the Senate, General Counsel Shanor implied that *Abenante v. Fulflex* had been involuntarily dismissed as a result of the *Betts* decision.[23] In fact, however, the Commission's appellate counsel had written directly to the First Circuit Court of Appeals asking that the matter be voluntarily dismissed in light of *Betts*. Not only was the Commission's testimony in this regard not forthright, but its action in actively seeking dismissal of one of its own cases undermined the private plaintiffs involved in that case.

Along similar lines, the Commission has never argued that the *Betts* legislation should not apply retroactively to pending cases in which the Commission is involved, even though this argument was successfully adopted by the only court of appeals to address the issue, *Mitchell v. Mobil Oil Corp.*, 896 F.2d, 463 (10th Cir.), *cert. denied*, 111 S. Ct. 252 (1990).

From a more general perspective, troubling issues have recently been raised by the Adminstration's conspicuous lack of involvement in important ADEA issues pending before the Supreme Court. In two recent cases, the Adminstration declined to file briefs *amicus curiae* in support of ADEA plaintiffs despite the EEOC's consistent and vigorous support of similarly situated plaintiffs in the lower federal courts.

The issue in *Gilmer v. Interstate/Johnson Corp.*, 895 F.2d 195 (4th Cir.), *cert. granted*, 111 S. Ct. 41 (1990), was whether a compulsory arbitration agreement executed at the time of hire constitutes a valid waiver of an employee's ADEA rights. Under the ADEA, the EEOC has consistently argued that such agreements do not constitute a waiver of ADEA rights. Despite the EEOC's recommendation to the Office of the Solicitor at the Department of Justice, however, the Administration refused to file a brief in support of the plaintiff in *Gilmer*.

In *Gregory v. Ashcroft*, 898 F.2d 598 (8th Cir.), *cert. granted*, 111 S. Ct. 507 (1990), the issue concerned the mandatory retirement of state court judges under the ADEA. The EEOC has taken an active litigation role in attempting to establish the principle that state court judges, like other employees subject to ADEA coverage, may not be mandatorily retired at age 70.[24] Despite both the EEOC's litigation position and its recommendation to the Office of the Solicitor at the Department of Justice, however, the Administration refused to file a brief in support of the plaintiffs in *Gregory*.

C. AVOIDANCE OF CRITICAL ISSUES

The Commission's litigation strategy continues to actively avoid involvement in issues pertaining to early retirement incentive programs. These cases involve two principal types of allegations. First, employees targeted by early retirement incentive programs often are coercively discharged in violation of the ADEA. The *Lusardi* case, in which a class of over 1,300 punitive plaintiffs challenged just such a plan, was a perfect example of the type of large-scale litigation in which the Commission refused to engage.[25] In *Lusardi*, the plaintiffs alleged that they were either laid off, terminated or forcibly retired as part of a company-wide reduction in the early part of the 1980's.

Second, many early retirement incentive programs raise issues regarding discrimination in employee benefits. Here again, the Commission refused to engage in any litigation regarding this type of program, regardless of the issue. Because of the prevalence of early retirement incentive programs, particularly during slow economic periods, the Commission's failure to involve itself in these types of claims represents a critical shortcoming in their litigation enforcement efforts.

IV. Recommendations for Change

The recommendations contained in *One Nation, Indivisible* remain current and need not be repeated here. Four areas justify emphasis, however.

A. CASE BACKLOGS

The legislative extension of the Age Discrimination Claims Assistance Act in 1990 underscores the need for the Commission to reduce its backlog. Ultimately, the backlog of cases has a direct and substantially adverse effect on ADEA complainant's ability to effectively pursue legal actions to protect their rights. This should remain the Commission's top priority.

B. EARLY RETIREMENT INCENTIVES

The Commission has no regulatory position, policy statement or litigation enforcement strategies regarding the use of early retirement incentive programs, despite the fact that these programs are admittedly targeted toward older workers and designed to encourage their departure from the workforce. This purpose alone, contrary to the fundamental purpose of the ADEA, mandates that the Commission develop an effective policy and litigation strategy designed to ensure that these programs are both non-discriminatory and totally voluntary.

C. DISCLOSURE AND ACCOUNTABILITY

The Commission's reluctance to engage in class litigation under the ADEA has adversely affected its disclosure policies under the statute. The Commission should immediately modify its disclosure policies to ensure that all aggrieved individuals are notified of (1) the respondent's position on their claims, (2) their independent right to pursue legal action based on a timely filed charge of age discrimination, and (3) their right to opt in to private litigation already pending.

Chapter X

National Origin and Citizenship Discrimination Caused by IRCA's Employer Sanctions: A Comparison of Remedies

by Jonathan L. Abram

I. Introduction

When it enacted the Immigration Reform and Control Act in 1986, Congress sought to stem the influx of undocumented immigrants by making it unlawful, for the first time in history, to hire or employ undocumented aliens. Three years later, when the Commission issued its Report in 1989, preliminary data seemed to bear out Congress's fear when it enacted IRCA's employer sanctions — that they would result in discrimination by employers against lawful workers who look or sound "foreign" or have foreign-sounding names.

Now, based the final study of the General Accounting Office (GAO), the facts confirm that sanctioning employers for hiring undocumented applicants has provoked widespread employment discrimination against persons who are either citizens of the United States or otherwise lawfully entitled to work here. This pattern of discrimination has remained despite years of effort to educate employers about their obligations under IRCA's employer sanctions provision, and despite years of federal effort to enforce IRCA's prohibition against employment discrimination based on national origin and citizenship status. Although much more could be done to educate employers and enforce IRCA's anti-discrimination provision, the most effective remedy for this demonstrated pattern of discrimination is to eliminate the cause by repealing employer sanctions.

II. The Problem of Discrimination in the Wake of IRCA

A. SANCTIONS HAVE IGNITED WIDESPREAD DISCRIMINATION AGAINST CITIZENS AND OTHERS AUTHORIZED TO WORK IN THE UNITED STATES.

When it enacted IRCA's employer sanctions, Congress put in place a series of annual reviews by GAO designed to determine, among other things, whether imposition of employer sanctions results in "a pattern of [national origin] discrimination against citizens or nationals of the United States or against eligible workers seeking employment."[1] In its first report, issued in 1987, one year after IRCA's enactment, GAO made no finding of sanctions-related discrimination: in its second, issued in 1988, GAO found substantial new or increased national origin discrimination since IRCA's enactment, but was unable to determine whether this discrimination was caused by sanctions.

GAO issued its third report in March 1990, and its findings were dramatic.[2] It surveyed employers throughout the country about their hiring and employment practices before and after IRCA. Even though the survey simply called for self-descriptive responses, GAO found that after IRCA became law, practices amounting to national origin or citizenship discrimination were instituted by some 891,000 employers nationwide — employers who hired some 6.8 million persons in 1988.[3] The incidence of discrimination was highest in areas with large Hispanic and Asian populations. In Texas, for example, some 22% of surveyed employers stated that after IRCA was enacted, they began to hire only U.S. citizens, and refused to hire others even if they were authorized to work here. Nationwide, some 14% of employers admitted they began discriminating against non-citizens after IRCA, and these employers were responsible for hiring an estimated 4.9 million persons in 1988.[4]

GAO also conducted hiring audits of 360 employers in Chicago and San Diego, using testers to determine how persons who look or sound foreign fare in applying for unskilled or entry-level work, compared to those who appear "Anglo." Using Hispanic testers, GAO found that person who look or sound foreign are three times as likely as Anglos to encounter unfavorable treatment when applying for jobs in the United States; overall, Anglos received 33% more interviews and 52% more job offers than closely matched Hispanics.[5]

B. THIS WIDESPREAD DISCRIMINATION HAS OCCURRED DESPITE SUBSTANTIAL EDUCATIONAL AND ENFORCEMENT EFFORTS THAT ARE UNLIKELY TO IMPROVE.

Many have suggested that a major reason for discrimination in the wake of IRCA sanctions has been employer ignorance about the sanctions rules, particularly those relating to verifying an applicant's authorization to work and about the prohibition against discrimination. Unsure about how to comply with IRCS's worker verification requirements, employers seek to avoid the risk of sanctions by discriminating against persons who appear foreign or who have foreign names, even if they are United States citizens or otherwise lawfully entitled to work. In the three years after IRCA's enactment, INS made a substantial effort to combat employer ignorance and the discrimination it may cause, contacting over 2.2 million employers to explain IRCA's requirements, distributing a handbook explaining the law to over 7 million employers, and conducting a national media campaign.[6] Yet despite these substantial efforts to educate employers, GAO found that in the years 1988 and 1989, while employers became more aware of IRCA generally, their understanding of sanctions and verification rules decreased significantly.[7]

After over four years of sanctions, the facts are largely established: they do cause widespread discrimination on the basis of national origin and citizenship adding to the already difficult situation facing Hispanics and other ethnic minorities in this country, and diligent efforts to explain sanctions to employers have not prevented that discrimination. The question, then, is whether further adjustments to existing educational and enforcement efforts are likely to eliminate this widespread discrimination, or whether the time has come to end the sanctions that cause it.

III. Remedying the Problem or Eliminating Its Cause

A. THE CALL FOR REPEAL

After GAO issued its third and damning report, bills were introduced in both houses of Congress to repeal employer sanctions in order to eliminate the cause of the discrimination. Senators Hatch and Kennedy joined forces, along with Senators DeConcini, Cranston, and Bingaman, to introduce the Employer Sanctions Repeal Act of 1990, S. 2797, 101st Cong., 2d Sess, and Congressman Roybal was joined by 21 others in introducing a similar measure in the House. *See* H.R. 5185, 101st Cong., 2d Sess.; H.J.Res. 534, 101st Cong., 2d Sess.

The United States Commission on Civil Rights voted unanimously to call for repeal of sanctions, and its Chairman, Arthur A. Fletcher, testified in Congress in support of repeal:

> There are those who implicitly seem to believe that added discrimination against American workers is a small price to pay to stem the flow of illegal immigration. The Commission on Civil Rights takes strong exception to this point of view. Discrimination, irrespective of its source and form, is intolerable, but discrimination caused by a policy of the Federal government is especially offensive and can never be justified.[8]

A wide array of other organizations joined the call. *The Wall Street Journal* described IRCA as "the first legislation since Jim Crow where the government is so closely aligned with a process that produces discrimination," and criticized IRCA for "deputiz[ing] all employers as immigration cops by requiring that they somehow make sure their employees are in the country legally."[9] Predictably, the call for repeal was joined by groups representing the interests of those who suffer discrimination caused by sanctions — La Raza, MALDEF, the Asian American Legal Defense and Education Fund, among others. Voices on the other end of the political spectrum also joined in. A Heritage Foundation study decried the widespread discrimination caused by sanctions and called for repeal:

> Congressional failure to repeal employer sanctions would be an affront to the thousands of Hispanics and Asians who are legal residents but whose civil rights have been violated because prospective employers have wanted to take no chance on hiring anyone who looks foreign or has a foreign-sounding name.[10]

B. OTHER REMEDIES SHORT OF REPEAL

Simultaneously, many groups advocating repeal also advocated other steps in the event sanctions remain, to strengthen enforcement of IRCA's anti-discrimination provisions, to increase even further the effort to educate employers about IRCA's requirements, and to make compliance with the law easier for employers. Joining them was the Task Force on IRCA-Related Discrimination. The task force was statutorily established as part of IRCA and was designed to begin its work if GAO found widespread discrimination. The task force consists of the Assistant Attorney General, Civil Rights Division; the Vice Chairman of the EEOC; and the Chairman of the Commission on Civil Rights.

In its September 1990 Report,[11] the Task Force began by making clear that its role did not encompass consideration of repealing sanctions. Instead, attaching as an appendix the statement supporting repeal by Arthur Fletcher, the Task Force limited itself to analyzing what additional steps short of repeal could be added to those adopted in the four years since IRCA was enacted to reduce the level of discrimination caused by sanctions.[12] Among the Task Force's proposed additional steps, advocated by many other groups as well, were these:

1. Establishing Regional OSC Offices. Paralleling the recommendation in the Commission's 1989 Working Paper, the Task Force began by advocating at least three regional offices for the OSC, the enforcer of IRCA's anti-discrimination provision, which until now has been located only in Washington D.C.

2. Equalizing penalties for violations of IRCA's antidiscrimination and sanctions provisions. Employers who hire unauthorized aliens risk penalties ranging up to $10,000; employers who discriminate against lawful workers risk penalties that are capped at $2,000. The Task Force urged symmetry between the penalties to avoid tilting employers toward discrimination to avoid sanctions.

3. Prohibiting retaliation against those who seek protection under IRCA's antidiscrimination provision. IRCA contains no provision equivalent to Title VII's prohibition against retaliation, and the Task Force urged that one be added.

4. Strengthening enforcement mechanisms in several ways, expanding the powers of Administrative Law Judges to tailor their remedies to the discrimination found in individual cases; including state agencies in aspects of IRCA enforcement; amending IRCA to allow the OSC to enforce subpoenas in federal courts; and expanding IRCA's restrictive attorneys' fees provision to afford fees to prevailing parties, as Title VII does.

5. Further increasing educational efforts, aimed both at employer ignorance about verification rules and at applicants' ignorance about their rights under IRCA's antidiscrimination provision.

6. Calling for further GAO Reports. If sanctions are not repealed and further remedial measures are again implemented, the Task Force recommended that Congress call for a fourth GAO study so that it can consider the matter further after another period of enhanced enforcement and educational efforts.

Although they are important if sanctions are to remain, these proposals are very much more of the same. The proposed additional remedial measure that is most frequently voiced and most controversial involves efforts to streamline the documentation used to demonstrate authorization to work in the United States. The theory is that much discrimination is caused by employer confusion at the array of documents that can be presented to verify work authorization, and that this discrimination will be eliminated by making it easier for employers untrained in reviewing immigration documents to determine whether an individual job seeker is authorized to work or not.

This proposal raises fears among many civil libertarians that it would lead to a single nationwide identification card or steps like a telephone call-in verification system they see as even closer to George Orwell's Big Brother. Many are suspicious of granting the Federal government the power literally to grant or deny persons the right to work, especially in view of the potential for bureaucratic difficulties of the kind that often occur at INS.

The Task Force steered a middle course, recommending that INS narrow the array of work authorization documents so that employers need only be familiar with common United States documents (birth certificate or passport), and five different kinds of INS documentation.[13] The Task Force recognized, however, that while streamlining the documents it currently issues could be accomplished in a year or so, INS would take much longer to replace the several often confusing versions of the Green Card in the hands of millions of lawful residents around the country.[14]

IV. Conclusion and Recommendations

A. REPEAL EMPLOYER SANCTIONS

The GAO Report demonstrates that efforts taken over a period of four years to expand employer awareness about IRCA's requirements and to strengthen enforcement have failed to eliminate discrimination caused by sanctions. Most proposals for further remedial efforts are more of the same, and there is no basis for thinking that more tries will yet succeed.

Some part of the discrimination problem is no doubt caused by confusion among employers about who they can hire and who they cannot. Streamlining the employment verification system might reduce discrimination somewhat by making it easier to learn facts about job seekers' citizenship or immigration status, but doing so in the dramatic way that might have this effect raises such serious civil liberties concerns that it is unlikely to be done. Employers can no longer be asked to enforce the effort to exclude undocumented aliens while at the same time being told that no simple means exists for determining whether a person is "documented" or not. The result, inevitably, is discrimination against persons entitled to work.

Thus, sanctions will inevitably result in one of two evils. Either employers will continue to judge the right to work on the basis of confusing documents and therefore discriminate against those who seem foreign, or some Federal agency will begin issuing identity cards — an action that raises fundamental privacy objections. If a streamlined national identity system is necessary to prevent discrimination by employers who fear sanctions, then sanctions must be abolished, for even IRCA recognizes that excluding the undocumented is not worth establishing a national identity card.[15]

Even if sanctions have an effect on illegal immigration, it is not worth violating our Nation's fundamental commitment that persons be judged on their merits and not on the basis of their national origin, or foreign-seeming name, appearance or accent. Accordingly, employer sanctions should be repealed.

B. OTHER STEPS SHORT OF REPEAL

No credible evidence exists to support the conclusion that after four years of efforts, more refinements in educational outreach and IRCA enforcement will substantially affect the level of discrimination found by GAO. If sanctions are to remain, immediate steps must be taken in the same areas so often addressed in past efforts to reduce sanctions-related discrimination — enforcement and education. However, GAO's findings indicate that bolstering enforcement and education for the sake of retaining sanctions will be costly.

1. ENFORCEMENT

OSC can no longer remain in its Washington, D.C. offices and expect victims of discrimination to come to it. The Task Force recommended that at least three regional offices be established in those areas that have generated the highest number of complaints to the Washington office. GAO's findings indicated, though, that nationwide at least 11% and in some areas as many as 22% of employers reported instituting steps after IRCA that amount to national origin or citizenship discrimination. With discrimination levels such as these, OSC offices are called for in all areas of the country with significant ethnic minority populations, and these new offices should be staffed at levels that permit not just adequate response to complaints, but also affirmative investigation, including testing.

In addition, until its resources are made sufficient to accomplish its principal purpose of combatting discrimination against foreign-looking or -sounding persons, the OSC should not expend limited resources toward less central ends, such as filings against employers alleged to "discriminate" against citizens by use of the H-2 foreign worker programs.[16]

And the enforcement mechanism available to the OSC and to victims of discrimination must be strengthened in the ways advocated by the Task Force: amending IRCA to allow the OSC to enforce subpoenas in federal courts; expanding the powers of Administrative Law Judges to tailor their remedies to the discrimination found in individual cases; and expanding IRCA's restrictive attorneys' fees provision to afford fees to prevailing parties, as Title VII does.

2. EDUCATION

Every year calls have come for increased educational outreach, both to employers about the verification requirements IRCA imposes on them and to job-seekers about their rights if employers discriminate against them or run afoul of IRCA's limitations on their duty to ask for verification of employment. If sanctions are to remain, enforced as they are by employers, then a major increase in the budget for education must be approved so that the "immigration cops" IRCA relies on will have some hope of complying with both its sanctions provisions and its prohibition against discrimination. Some increases have been approved, but GAO's findings show that much more will be needed.

Chapter XI

Important Developments in the Civil Rights Impact of National Health Policies

by Susan M. Mathews, Barbara Eyman Antonisse, Ellen S. Cogen, Susan B. K. Kahan, Anne B. Camper

I. Introduction and Overview

For those with access to it, health care in the United States is among the finest in the world. But for a growing number of Americans, quality health care can be difficult or even impossible to obtain. Today, the well-to-do and the well-insured obtain medical care as needed from a physician or medical specialist. Unfortunately, the poor and the under- and un-insured frequently cannot afford basic medical treatment. These people will often wait until a condition becomes acute and care can be sought in a public hospital emergency room, where there are laws protecting the uninsured from being turned away.

Not surprisingly, those with the least access to health care are the same groups with reduced access to education, housing and employment — minorities, women and children. Tragically, these access problems compound one another: diminished access to education, suitable housing, and substantial employment increases exposure to social and environmental health risks. The result is a downward spiral, with diminished health status further limiting access to employment, housing and education. As we endeavor to overcome the obstacles to access in each of these areas, health care becomes a civil rights issue.

This chapter outlines the Bush Administration's response to the health problems and the limited access to health care experienced by minorities, women, and children. As the body that determines national public health policy, the United States government and the Bush Administration have both the opportunity and the responsibility to address and resolve the growing disparities in health status and health care access.

Part One of this chapter details the growing minority health gap and its relationship to national health policy. In addition, the Administration's response to the specific health issue of tobacco advertising is explored. Part Two examines the impact of national policies on the health of women and children. The issues explored in this section include infant mortality, prenatal care, fetal protection, child care, health research, and aging.

The authors conclude that, although the Bush Administration has often correctly identified the problems and even the causes of this nation's health gap, its response in many areas has been inadequate. The urgency of the health problems facing many Americans today demands a more thorough response. Prompt action to diminish the ever-growing health crisis would both alleviate needless suffering and save economic and social costs in the long run.

II. Minority Health Issues

Over the past generation, the health status of United States citizens as a group has improved. Nevertheless, this general upward trend does not reflect the situation of all Americans. There continues to be a disparity in the number of deaths and illnesses experienced by members of racial and ethnic minority groups, as compared to those experienced by non-minorities.[1] This disturbing phenomenon is referred to as the "health gap."[2]

A. THE HEALTH GAP

In 1984, the Task Force on Black and Minority Health of the U.S. Department of Health and Human Services compiled statistics that set forth, in stark terms, this long-standing disparity. For example, Blacks have a life expectancy of 69.6 years compared to 75.2 years for non-minorities — a gap of over five years.[3] American Indians die from injuries at almost twice the rate of non-minorities.[4] Blacks have twice the infant mortality rate of Whites.[5] And even though life expectancy for the general population has increased over time, the most recent data from the National Center for Health Statistics shows that for black Americans life expectancy has declined since 1984.[6] A handful of health problems account for most of this disparity in life expectancy.

Low birthweight is a factor in 60 percent of minority infant deaths.[7] Research has shown that many of the risk factors associated with low birthweight babies and infant deaths are the result of social and economic conditions.[8] Risk factors include: low income and lack of health insurance to cover appropriate medical care; poor nutrition; inadequate housing; limited maternal education; stressful work environment; youth of the mother; dysfunctional family and lack of social supports; and transportation and childcare problems that impede use of medical and social services.[9] These problems are most prevalent among low-income and minority women and children.

A second health problem contributing to the "health gap" between minorities and non-minorities is diabetes. Diabetes is associated with complications such as kidney and heart disease, blindness, and stroke, and is 33 percent more common among Blacks than among Whites. The statistics are even more grim for black women, who are 50 percent more likely to develop diabetes than white women.[10] Hispanics in the United States are at three times the risk of developing diabetes as non-Hispanic Whites, while Native Americans are ten times more likely than Whites to develop this disease.[11] Obesity, more prevalent in minority populations, has been targeted as a major risk factor of diabetes.

Cancer, a leading cause of death generally in this country, hits certain minority groups particularly hard. Black men have a 25 percent higher incidence of cancer than non-minority men. In addition, black men are more likely to die from cancer than any other population group in the United States.[12] For lung cancer the gap is especially wide; the incidence is 45 percent higher among black men than among non-minority men.[13] In addition to tobacco smoking, occupational factors may contribute to the high rate of cancer in minority groups. For example, cancer rates among Blacks rose dramatically after 1950, possibly due to increased exposure to toxic substances in the factory workplace.[14]

The survival rate of cancer patients reveals another health gap. Because of early diagnosis and improved treatment, cancer survival rates are higher now than ever before. Almost half of all cancer patients today survive at least five years.[15] However, only 38 percent of Blacks with cancer survive five years after a cancer diagnosis.[16] For American Indians, cancer survival rates are 14 percent lower for men and 16 percent lower for women, as compared to non-minorities.[17]

The existence of this "health gap" is by no means a secret. The President and his Secretary of Health and Human Services have discussed it time and time again. The question remains: What is being done to close it? The Bush Administration has made strides in addressing some of the problems contributing to the gap, yet it is clear that more work still needs to be done. In his Fiscal Year 1991 budget proposal for the Department of Health and Human Services (HHS), the President identified *access* — access to information on medical, environmental, social, and economic factors that contribute to good health, as well as access to qualified health care providers — as the key to good health and to shrinking the health gap.[18]

B. MINORITY HEALTH INITIATIVE

Recognizing the connection between access to health care and improved health status, the President, in his proposed budget for HHS, requested $117 million for a "Minority Health Initiative."[19] In general, this initiative was aimed at increasing the number of minority health professionals and sustaining faculty at minority medical institutions. It would also support creative, community-based approaches to recruiting minorities into health service careers, as well as strategies for offering health services in association with low-income, public housing.[20]

More specifically, the President's 1991 HHS budget proposal called for $55 million for the National Health Service Corps to recruit disadvantaged and minority health profession students to practice in underserved areas. The NHSC funds would support federal and state loan repayment agreements as well as scholarships, and it is predicted that approximately 750 students could be helped through this effort.[21] Included in the proposal was $12 million for faculty and tuition assistance in minority health professions schools, and $5 million for grants to communities and institutions for recruitment and educational support for the health professions.[22]

A request for increased funding for the Office of Minority Health (OMH) was also part of the Administration's efforts to improve the status of health for minorities. One of the major functions of the OMH is to ensure that national health policy takes into consideration the needs of minority populations. The President requested $20 million dollars for OMH, a $12 million dollar increase over the amount available for OMH in FY 1990.[23] The budget request included $11 million to assure greater generation, facilitation, and coordination of national public and private minority health efforts, and $5 million to be directed toward minority HIV/AIDS initiatives.[24]

President Bush's "Minority Health Initiative" can be compared to the "Disadvantaged Minority Health Improvement Act of 1989" (S. 1606 and H.R. 3240) introduced by Sen. Kennedy and Rep. Stokes. These bills, nearly identical, were more far-reaching than the President's initiative. They sought to improve the health status of disadvantaged minority Americans with a three-fold approach: 1) they would provide support for health promotion and disease prevention for illnesses that are disproportionately prevalent among minorities; 2) they would authorize the Office of Minority Health to coordinate federal efforts to better understand and reduce the incidence of illness among minority Americans; and 3) they would attempt to increase the number of minority health professionals. The bills would cost approximately $117 million in new funding for FY 1991.

Both the congressional and President Bush's initiatives stem in part from the idea that the system of health care for minorities in this country would be improved if more minority members were involved in the system as health care providers.

Following an unexpectedly lengthy and politically charged budget summit and legislative session, the final appropriations figures for programs under the President's Health initiative were substantially greater than the President's request. For example, the National Health Service Corps alone received appropriations of $91.7 million for FY 1991. In addition, the Minority Health Improvement Act of 1990

(P.L. 101-527) authorized an additional $106 million for educational loans and scholarships, primary health care assistance for public housing projects, and research into minority health problems. More importantly, the Office of Minority Health in the Department of Health and Human Services was granted statutory authority, over the President's strong objections. While it is clear that the President recognizes the serious problem of the "health gap," it is also apparent that the Congress sees the problem as more immediate and in need of funding than does the President.

C. THE ANTI-SMOKING CAMPAIGN

President Bush's Secretary of Health and Human Services, Louis W. Sullivan, has launched an active campaign against cigarette smoking in American society, with a particular emphasis on advertising targeted at minorities, women, and children. According to Secretary Sullivan, in 1989 nearly 390,000 Americans died of smoking related illnesses — more than 15 percent of all deaths.[25] Among women, lung cancer has replaced breast cancer as the leading cancer killer. Black Americans, for the past 25 years, have consistently been far more likely to smoke than their white counterparts.[26] Today, a black man in Harlem has a shorter life expectancy than a man in Bangladesh, in part due to the use of alcohol and cigarettes.[27] Approximately one million teenagers become addicted to tobacco each year, or 3,000 per day.[28]

In response to these alarming statistics, Secretary Sullivan, in 1990, began to speak out against cigarette sales and advertising, in particular those targeted at minorities, women and children. Due largely to public outrage precipitated by the Secretary's remarks, the R.J. Reynolds Company was forced to withdraw its plans to market a new brand of cigarettes — to be called "Uptown" — targeted specifically at urban Blacks. The manufacturer later introduced "Dakota" cigarettes, geared toward women aged 18-24 having no post-high school education (known within the company as "V.F.'s", or virile females).[29]

By late spring, 1990, hearings in both the House and Senate had been held and bills had been introduced[30] to reduce the ability of tobacco manufacturers to lure new population groups to smoking. Some of the bills would prohibit the use in cigarette advertising of human photographs or cartoon figures in order to reduce opportunities to market to specific groups. Some would require larger warning labels. Still others would prohibit the sale of cigarettes through vending machines that are accessible to minors, and would license cigarette retailers in order to improve enforcement of state laws prohibiting sales to minors.[31] Secretary Sullivan has proposed a Model Sale of Tobacco Products to Minors Control Act, which would incorporate many of these elements.[32]

Yet critics insist that the Administration has not gone far enough in its anti-smoking effort. The federal government has paid homage to tobacco as a valuable cash crop for more than 200 years, says Rep. Chester G. Atkins (D, Mass). Tobacco money, claims Atkins, accounts for the moral climate that recently allowed the U.S. international trade representative, Carla Hills, to decide "for the fourth time in four years . . . that cigarettes are a harmless commodity."[34] To explain the Bush Administration's reluctance to approach the tobacco issue solely from a medical standpoint, Secretary Sullivan has noted that "the trade in tobacco is not only a health issue but a fiscal issue."[35] The result of this attitude is a reluctance on the part of Secretary Sullivan to extend his anti-smoking efforts into the international trade arena. In public statements, Secretary Sullivan has said that American companies deserve access to foreign markets for cigarettes just as they do to markets for cars, cameras, and stereos. Former Surgeon General C. Everett Koop, MD, is critical of this position, and both he and Sen. Edward M. Kennedy (D-Mass) have spoken critically of "whoever it was" who kept Assistant Secretary for Health James O. Mason from appearing as a witness at a congressional hearing where he was expected to repeat his "eloquent" anti-tobacco testimony.[36]

D. IS THE ADMINISTRATION DOING ENOUGH TO CLOSE THE GAP?

As with the treatment of the smoking issue, many believe that, although the Administration has made significant efforts to close the health gap for minorities, a great deal more could be done. For example, most strides in health research have been accomplished using white males as the test group. This leaves many physicians uncertain whether the effects of a particular treatment would be the same for their female and minority patients. A related problem has to do with the channeling of health care dollars toward health problems primarily faced by white males. In the past, less emphasis and money has been directed toward diseases, such as sickle cell anemia, that primarily strike minorities.

A more general, but extremely serious, health-related problem among minorities is that of homicide and unintentional injuries. Among black men aged 25 to 34, the homicide rate is seven times that of Whites; among Hispanic men between the ages of 20 and 24, the homicide rate is four times that of Anglo men.[37] Yet, the Administration has consistently opposed most gun control initiatives despite the correlation between homicide and ready access to firearms.

Lastly, although the scourge of drugs has pervaded nearly every corner of our society, minorities have been especially hard hit by this problem, as well as related ills such as AIDS and HIV infection. Blacks, Hispanics, Asian Americans, Pacific Islanders, and Native Americans account for 45 percent of all people with AIDS, even though they make up only 24 percent of the U.S. population.[38] In addition, the proportion of AIDS cases related to intravenous drug use is greater among Blacks and Hispanics than among other Americans. Many believe that an adequate war on drugs can only be waged by giving as much attention to rehabilitation and treatment programs as to interdiction efforts. However, waiting lists for entrance to federally funded drug treatment centers continue to grow without sufficient funding to accept all of those who ask for help. Moreover, private drug treatment facilities generally take only those patients who have private health insurance coverage, excluding many poor and minority substance abusers. With the "war on drugs" as a central theme to President Bush's campaign, funds are flowing mightily toward closing off the drug supply, while little additional money is being offered to increase assistance for those hoping to reduce the demand.

III. Women and Children's Health

This section focuses on national health issues that have an overwhelming impact on women and children. It should be emphasized that many of these issues are of particular importance to minority and low-income women and children. Pregnant women and young children constitute an especially vulnerable population whose health care needs are frequently unmet. Additionally, the adverse impact on women of certain health policies has been recognized only recently, if at all.

A. RECENT CHANGES IN MEDICAID AND OTHER FEDERAL SPENDING FOR WOMEN AND CHILDREN

In contrast to the current interest in cost-cutting measures to control the growth in federal health care spending, there have been expansions in Medicaid eligibility for women and children during the last two years. Under the Omnibus Budget Reconciliation Act of 1989 (OBRA '89), income eligibility levels for pregnant women and infants under one year old were expanded from 100 percent to 133 percent of the federal poverty level. Standards were also expanded to cover children between the ages of one and six years of age (only infants less than one year old were previously covered).[39] Additionally, the Medicare Catastrophic Coverage Act of 1988 (MCCA '88) gave states the option of extending Medicaid coverage to pregnant women and infants who have an income up to 185 percent of the official poverty line and who are not otherwise qualified to receive Medicaid.[40]

While President Bush has expressed support for this type of expanded Medicaid eligibility criteria for women and children in the past, his actions have been inconsistent with his words. During his presidential campaign, President Bush vowed to expand Medicaid income eligibility standards up to 185 percent of the poverty level for women and infants. This year, however, the President and Secretary Sullivan, in response to pressures from state governors, supported a freeze in further Medicaid expansions.[41] In July 1989, President Bush formed a White House Task Force on Infant Mortality, headed by Dr. James O. Mason, Assistant Secretary of Health and Human Services. In November 1989, the Task Force completed a report recommending, among other things, that mandatory Medicaid income thresholds be raised to 150 percent of poverty, which would add 120,000 women and infants to the Medicaid rolls. However, the report has not yet been officially accepted or issued by the White House.[42] HHS Secretary Sullivan has been severely criticized for "covering up" the results of the report. Rep. John Dingell (D-MI), in an August 8, 1990, letter, accused HHS of withholding the findings because they would be a "political embarrassment" to the President.[43] Results of the study were reportedly leaked to the press because members of the task force were frustrated with the lack of White House response.[44]

Even with the MCCA '88 and OBRA '89 expansions in place, it is not clear that these changes have resulted in a significant increase in the amount of care available to pregnant women and children. State governors are publicly resisting mandatory increases in Medicaid eligibility because of the expense to the states; many believe that the federal government is simply shifting costs to the states through broad cuts in welfare spending.[45] On the other hand, much of the Medicaid coverage for pregnant women and children is optional, not mandatory. Some states with large high-risk populations, such as Texas and Wisconsin, have declined the option to expand Medicaid eligibility. Most importantly, as will be discussed below, the lack of adequate prenatal care and the extreme lack of resources for a large number of American women and children demand a larger response than simple expansion of existing Medicaid programs can provide.

The other major federal program that funds prenatal care is the Title V Maternal and Child Health Program.[46] This program is small in comparison to Medicaid, with an annual allocation of approximately $500 million. This program provides block grants to states for the provision of prenatal and infant care. These grants may be given to individuals, private service-providers, health education programs, transportation services, or other related programs. In 1989, Congress passed and the President signed a new provision for Title V that calls for the development of model "Maternal and Child Assistance Programs" that utilize various sources of pre-existing federal funding.[47] In 1990, appropriations for the Title V program was $554 million. President Bush requested no increase in funding to this program for FY 1991. However, appropriations for the Title V Maternal and Child block grants included an increase of over $34 million for FY 1991.

B. PRENATAL CARE AND INFANT MORTALITY

Statistics regarding prenatal care and infant mortality, particularly among minorities, continue to be alarming. The Department of Health and Human Services places the U.S.

infant mortality rate for 1987 (the last year for which final data are available) at 10.1 deaths per 1000 live births. The rate for Whites is 8.6, whereas the rate for Blacks is more than twice as high, at 17.9.[48] The National Center for Health Statistics is projecting a national infant mortality rate of 9.2 in 1990, with a rate for Blacks of 16.6.[49] The report by the White House Task Force on Infant Mortality estimates that every year 10,000 infant lives could be saved, and 100,000 infants could be spared from disability, through improved prenatal care alone.[50] Recent studies by the National Commission to Prevent Infant Mortality and the Committee to Study Outreach for Prenatal Care of the Institute of Medicine have come to similar conclusions.[51]

Although the national infant mortality rate continues to decline slightly each year, the rate of decrease has levelled off dramatically while the gap between Blacks and Whites is actually increasing. In four predominantly non-white cities, Baltimore, Miami, Los Angeles, and the District of Columbia, the infant mortality rate has increased since 1986.[52] The most dramatic situation is that of the District of Columbia, which experienced a 50 percent increase in its infant mortality rate during the first six months of 1989, to a rate of 32.2.[53] Even the national rate for Whites (8.6 per 1000) compares unfavorably to the overall infant mortality rate in 13 other industrialized nations, including Japan (5.2), Finland (5.9), Sweden (5.9), Canada (7.9), and West Germany (8.5).[54]

Meanwhile, the number of high-risk mothers in the United States is increasing.[55] The number of babies born to mothers who are infected with AIDS or syphilis is rising. Also, a growing number of babies are born to drug-addicted mothers.

The increase in crack use and the spread of AIDS among IV drug users has made the drug problem a central issue in prenatal care. Estimates of the number of babies born each year who have been exposed to cocaine range from 30,000 to 350,000.[56] Access to drug treatment for pregnant women is practically non-existent.[57] For example, in New York City there is not a single treatment bed for a pregnant addict who is uninsured or dependent on Medicaid funding.[58] Today, less than 11 percent of federal drug funds are targeted toward treatment for women.[59]

Another critical factor in infant mortality is the high rate of teen pregnancy. Approximately 470,000 babies are born to teenage mothers in the United States each year. Most of these pregnancies are unplanned and underinsured.[60] Teen mothers are two to three times more likely to give birth to a low birthweight baby.[61] Very young women are the least likely to have public or private health insurance. While federal law requires that maternity care coverage be extended to employees and their spouses on the same basis as other health benefits, maternity benefits for teenage dependents are rarely covered through employer insurance.[62]

The Omnibus Budget Reconciliation Act of 1989 directs the Secretary of Health and Human Services to develop a national data system for linking information regarding all infant births and deaths with information detailing Medicaid claims submitted for perinatal care, delivery, or the infant's health care.[63] The resulting data will undoubtedly be useful in detailing the types of claims that are made, but it will yield no information on women who do not obtain Medicaid coverage. Another provision of this Act directs the Secretary to develop and distribute a maternal and child health handbook in consultation with the National Commission to Prevent Infant Mortality, a private commission made up of health care and policy experts.[64] The handbook has not yet been produced.

In addition to expansions in the Medicaid program, the report by the White House Task Force on Infant Mortality includes recommendations for improvements in other programs to fight the problem of infant mortality.[65] For example, the report calls for an additional $500 million a year to be spent on prenatal care programs. The report, as yet unreleased by the President, concludes that through application of existing knowledge and programs alone, fully *one fourth* of the annual infant deaths in the United States could be prevented.[66]

C. FETAL PROTECTION

"Fetal protection" is an issue that has received a great deal of public attention recently, primarily because the fetal protection policy of a private employer is currently under Supreme Court review in *International Union, UAW v. Johnson Controls*.[67] Fetal protection policies generally restrict the access of fertile or pregnant women to jobs that could pose fetal health risks. Many employers argue that such policies are morally required and a business necessity because of potential tort liability to a damaged fetus born alive. Fetal protection policies appear to be fairly common, especially in male-dominated job categories.[68] Despite the fact that there are many workplace hazards that may pose reproductive risks to men, fetal protection policies rarely, if ever, exclude men from the workplace.[69]

The Administration's response to fetal protection policies, both through the Equal Employment Opportunity Commission (EEOC) and the Occupational Safety and Health Administration (OSHA), has been consistently critical of policies that restrict the employment opportunities of women absent some showing that women alone are at a substantial risk. No current OSHA guidelines for workplace safety recommend that non-pregnant women be barred from the workplace. OSHA makes the suggestion in the case of lead exposure, the hazardous substance at issue in *Johnson Controls*, that both men *and* women who wish to conceive should be provided with respirators in order to reduce their blood lead levels.[70]

The EEOC has published policy guidelines on this issue directing regional offices to continue to accept Title VII claims based upon fetal protection policies that exclude only women from particular jobs. It has recently submitted an amicus brief in *Johnson Controls*.[71] The Commission's position is that such a restriction may only be justified by the employer as a bona fide occupational qualification (BFOQ). This is a difficult burden for employers to meet, requiring them to demonstrate that sex or fertility renders a particular category of people "unemployable." In effect, a company would have to prove that potential tort liability resulting from workplace reproductive hazards is so great that economic viability is not possible with any measures short of exclusionary employment policies.[72]

The brief submitted by the Solicitor General and the EEOC Policy Guidelines suggest that the EEOC has taken a very tough stance against fetal protection policies. However, while fetal protection policies apparently are very common throughout the country, the EEOC has undertaken no affirmative effort to eliminate them. It will therefore be left to individual employees to challenge fetal protection policies on a case-by-case basis.

On the other hand, while it is likely that the common fetal protection policy violates equal employment laws, these policies also clumsily point out an important health issue. Little is known about the reproductive hazards that women face today, and even less is known about potential reproductive hazards for men, because reproduction has often been considered a women's issue rather than a medical issue.[73] Furthermore, workers who are exposed to toxic substances may in turn expose members of their households, as well as a developing fetus, to these substances.[74] Yet little research has been conducted to determine the extent of this problem, either. Finally, because so little information is available about the magnitude of workplace reproductive hazards, it is impossible to know the relative effect of these hazards as compared to other environmental and behavioral factors such as tobacco smoke, diet, alcohol consumption, and physical activity. No major federal effort has been made to study or eliminate workplace reproductive hazards despite the fact that President Bush and his administration have demonstrated public concern about fetal health generally.

D. ABORTION

Although politically and ethically controversial, abortion remains a legal and a medically legitimate option for women in the United States. However, several Bush Administration actions have directly restricted access for poor women to this medical alternative. Restrictions have been placed on federal funding of abortion, and President Bush has vetoed several bills that have included federal funding of abortion, most recently a Medicaid amendment that would allow low-income victims of rape and incest to receive financial assistance for abortions.[75]

This term, the Supreme Court is reviewing a challenge to HHS regulations that prohibit Title X funding of family planning programs that counsel pregnant women about abortion or make abortion referrals, except in emergency situations.[76] Title X is the second largest source of public support for family planning after Medicaid.[77] It is clear that these Medicaid and Title X restrictions have the greatest impact on low-income, teenage, and minority women, who are most likely to be dependent upon federal financial assistance and federally assisted clinics for family planning services.

E. EMERGING ISSUES

There are a number of other health issues that have only recently been publicly recognized as important to women and children. Future health care and civil rights policy discussions will undoubtedly focus on the following issues.

1. BALANCE OF HEALTH CARE RESEARCH

In July 1990, the Housing and Consumer Interests Subcommittee of the House Select Committee on Aging held a hearing on the issue of medical research and women's health care. A GAO report presented at that hearing revealed that, despite a recommendation made in the 1985 Report of the Public Health Service Task Force on Women's Health Issues to increase research on health problems affecting women, there is still a substantial under-representation of women's health issues in NIH research. This "has resulted in significant gaps in knowledge."[78] NIH has funded major research projects that study only men, despite the fact that both men and women are affected by the disease or may benefit from the treatment. The most commonly cited examples are the National Heart, Lung, and Blood Institute study of the effect of aspirin on the recurrence of heart attacks, which studied 22,000 men and no women, and the National Institute on Aging's Baltimore Longitudinal Study of Aging, which began as an all-male study in 1958 and only added women in 1978.[79]

There has been very little NIH support of research projects that study medical conditions of importance primarily to women, such as breast, ovarian and cervical cancer, menopause, osteoporosis, and certain psychiatric disorders.[80] There is no obstetric or gynecologic research branch at NIH. In response to the growing awareness of women's health needs, the Breast and Cervical Cancer Mortality Prevention Act of 1990 was signed into law this year.[81] This law establishes a new public health grant program for the breast and cervical screening services for low-income women. The program authorizes grants to states totaling $50 million in the fiscal year 1991. Though the President's proposed 1991 Medicare budget contained no similar provisions, he did sign this legislation into law.

In response to significant public and Congressional attention to the issues of women's health, the President nominated women to fill two of the most influential health positions in government: Antonia Novello, M.D., as Surgeon

General and Bernadine Healy, M.D., as Director of the National Institutes of Health (NIH). In addition, the President had previously nominated Gail Wilensky for the position of Administrator of the Health Care Financing Administration. The appointment of Dr. Healy was particularly controversial because of her outspoken support for a lifting of the ban on fetal tissue research. In addition, the President has created an Office for Women's Health within the NIH to develop and oversee rules regarding the inclusion of women in health research programs at NIH.

2. CHILD CARE AND PARENTAL LEAVE

The increase in the number of families with a single parent or two working parents has resulted in a growing demand for adequate child care options and more flexible work arrangements. The nation's foster care system is also experiencing vast increases in demand, with minority and homeless children accounting for much of the increase.[82] President Bush has vetoed the Family and Medical Leave Act of 1990[83] and the Infant and Toddler Child Care Act,[84] two bills designed to help alleviate these pressures.

3. SPECIAL PROBLEMS OF OLDER WOMEN

In part because of the imbalance of NIH supported research, less is known about the aging problems faced by women than those faced by men.[85] Such factors as the increase in the number of older Americans each year, the longer life-span of women, and the fact that elderly women are institutionalized at a rate proportionately twice that of elderly men,[86] all result in an increasing crisis in the long-term care needs of women. Additionally, the increased years of life expectancy in the last two decades have been matched almost one-for-one with increased years of living with a disability.[87] As health care costs rise for the aged, more and more demands will be made upon the Medicare system. The federal government will be pressured to address long-term health care and insurance needs of older Americans.

One of the important developing needs of the nation's elderly is home care. Advances in technology, combined with cost effectiveness and the desirability of staying out of a nursing home, have made home care an increasingly attractive option. Representatives Henry Waxman (D-CA) and Ron Wyden (D-OR), along with Senator Jay Rockefeller (D-WV), have reintroduced a bill that would give state Medicaid programs the option of paying for "home and community" care for elderly persons.[88] The same bill was introduced and passed last year, but was reportedly blocked in conference by HHS.[89] This year the measure was passed as a part of the OBRA '90, despite pressure from HHS and the White House to drop it.

IV. Conclusions

President Bush, and particularly the Department of Health and Human Services, have clearly recognized the existence of a crisis in America's health care system. They also have the knowledge and resources to make vast improvements in many health areas.[90] However, response to the problem has been slow and piece-meal. Many aspects of the health deficit in this country have not been adequately addressed by the present administration, such as the presence of increased health risks in minority and low-income communities, the lack of adequate health insurance by many Americans, and the knowledge gaps attendant with health research that has been skewed toward the health problems of white males. Most importantly, the Bush Administration must accept the fact that today's health problems can be less expensive, in both economic and social cost, if treatment is not put off until tomorrow.

V. Recommendations

1. Although many studies have examined a number of specific health issues, the President and his national health policy advisors should evaluate the overall status of national health care and its connection to other social issues. This assessment is essential to a national health policy that is both comprehensive and compatible with domestic policy generally.
2. Greater efforts must be made to eliminate disparities between minorities and non-minorities in the delivery of health care services. Health care providers must be made sensitive to the problem of racial and sexual stereotyping and encouraged to treat all patients appropriately. Incentives for minorities to enter the health care professions may help to ease this problem.
3. Drug treatment must be made available to all women and disadvantaged minorities. The goal of such efforts should be to allow affected individuals to re-enter society as healthy and productive members, and to help pregnant women become healthy and responsible mothers.
4. Greater emphasis in Medicaid and other governmental programs should be placed on primary and preventive health care, as opposed to emergency or acute-care treatment.
5. The public school system should be used in assisting disadvantaged children in breaking the cycle of poor health in which many are trapped. The dangers of poor nutrition, smoking, drug use, and unprotected sexual intercourse must be emphasized in the curriculum.
6. Infant mortality and prenatal care must become a national priority. The problem demands both new programmatic responses and an increase in funds for existing programs. Numerous models for improvement already exist, including recommendations made by the White House Task Force on Infant Mortality, a report by the Committee to Study

Outreach for Prenatal Care by the Institute of Medicine, a report by the National Commission to prevent Infant Mortality, and successful local and state programs.

7. Mandatory Medicaid eligibility should be expanded to children of all ages, and income eligibility requirements should be increased to include a greater percentage of the currently uninsured.

8. Access to family planning services must be improved. Outreach and public education about pregnancy prevention is the best way to reduce teen pregnancies, unwanted pregnancies, and abortions.

9. There should be a national standard of complete insurance coverage of prenatal and maternity expenses for all women. In addition, the Pregnancy Discrimination Act should be amended to include maternity benefits coverage not only for spouses, but for dependents as well. Funding of Maternal and Child Health clinics should be expanded, with the goal of improving access and availability for all pregnant women.

10. A nationwide study of workplace reproductive hazards should be conducted by OSHA. This study should examine the effects of workplace hazards on both male and female workers, as well as members of the workers' households.

11. The imbalance of NIH medical research funding must be corrected. Current NIH grant request requirements for the inclusion of women and minorities in research should be enforced. Women and minorities should be included in study groups wherever feasible. Initiatives that study health issues of particular importance to women and minorities should be supported. New medical discoveries are fully beneficial only if all affected Americans can share in their fruits.

12. The government should study and resolve the problem of the disproportionate rate of placement of women in nursing homes. The health problems of aging women should also be examined. Home care alternatives to institutionalization of all covered individuals should be encouraged and appropriately compensated.

Chapter XII

Challenges Posed by the AIDS Epidemic

by Chai Feldblum

I. Introduction

People who have AIDS or who are infected with the Human Immunodeficiency Virus (HIV) are no different than people with other disabilities. Such individuals, who are called people with "HIV disease," experience similar problems with regard to discrimination in employment, housing, public accommodations and health care that other people with disabilities often face. In normal circumstances, there would be no reason to include a special chapter on people with HIV disease. The reality, however, is that individuals with HIV disease have often been treated differently than individuals with other disabilities. The Bush Administration took a significant step forward in 1989 when it endorsed the Americans with Disabilities Act, which protects people with HIV disease from discrimination in the same manner that it protects people with other disabilities. Significant progress, however, still needs to be made.

II. Definition of the Problem

One of the most virulent aspects of the AIDS epidemic has been the acts of irrational discrimination that have been directed against people with HIV disease. Such individuals have been fired from their jobs, evicted from their apartments, precluded from entering restaurants, swimming pools or airplanes, denied health care services by doctors and dentists, lost their health insurance, and have even been denied haircuts and manicures. Children with HIV disease have been ordered by school boards not to attend school.

Often, it is not simply the person with HIV disease who experiences discrimination. People who simply associate with such individuals are subjected to the same discrimination. A mother whose son has AIDS, a person who volunteers in an AIDS buddy-system, and doctors who provide care for people with HIV disease have all experienced the same discrimination directed against those they care for.

In many respects, the discrimination faced by people with HIV disease is generated by the same type of fear, ignorance, and stereotypes that has generated discrimination against people with other disabilities. Indeed, AIDS in the 1980's is the focus of the same type of fear, stereotyping and stigmatization that have been targeted against disabilities as varied as epilepsy, cerebral palsy, mental illness and tuberculosis — attitudes that were particularly intense during certain decades and that continue to this day.[1]

In certain respects, however, the discrimination against people with HIV disease is heightened by the wide-spread awareness that AIDS is currently an incurable and fatal disease and by the fact that the majority of individuals with HIV disease are members of two classes that have historically suffered discrimination in this country — gay men and IV drug users.

III. Statement of Governing Law

Section 504 of the Rehabilitation Act of 1973, which protects all people with disabilities from discrimination by entities that receive federal funds, protects people with HIV disease as well. Section 504 has been successfully used in various cases to order children with HIV disease back into schools,[2] and to reinstate employees into former jobs.[3] In addition, Section 504 has been used to challenge the exclusion of individuals from various health care services.[4]

In almost all cases brought under Section 504, the plaintiffs have prevailed based on the medical and public health consensus that people with HIV disease do not pose a significant risk of transmitting the virus to others in ordinary settings. Such individuals have almost always been found to be "otherwise qualified" under Section 504 for the position or services they seek. There have been some exceptions to this general trend: for example, one district court upheld the mandatory testing program of the State Department for Foreign Service personnel on the grounds that HIV-infected personnel were not "otherwise qualified" to serve overseas.[5]

IV. Major Events in the Law

Over the past few years, there have been a series of major events in the area of disability anti-discrimination law that have affected the civil rights protection available for people with HIV disease. The Bush Administration was helpful in advancing one of those major events: passage of the Americans with Disabilities Act. The Bush Administration, however, was not particularly active when a major challenge to the protection of people with HIV disease under the Americans with Disabilities Act was launched. A brief historical overview is necessary to understand the placement of the Americans with Disabilities Act.

A. SCHOOL BOARD OF *NASSAU COUNTY V. ARLINE*

In December 1986, the Supreme Court heard a case involving Gene Arline, a teacher with tuberculosis, who had been fired from her job.[6] A district court in Florida ruled that *all* individuals with contagious diseases, including tuberculosis, were not protected under Section 504 because the judge could not conceive that Congress intended to extend protection to people with such diseases. An appellate court for the Eleventh Circuit reversed the district court, ruling that Congress clearly intended to cover people with *all* kinds of diseases, including contagious diseases. The court noted that the main qualification within Section 504 was that such individuals had to be "otherwise qualified," that is, they could not pose a significant health risk to others.

In an *amicus* brief before the Supreme Court, the Justice Department argued that a person who suffered disabling effects as the result of a contagious disease could be protected under Section 504. Nevertheless, the Justice Department urged the Court to rule against Gene Arline in this case because the school had fired her based simply on a *fear of contagiousness* of tuberculosis. Referring to a memorandum it had recently issued, the Justice Department argued that Section 504 did not extend protection on such grounds.

In March 1987, the Supreme Court rejected the Justice Department's argument by a 7-2 vote. The Court ruled that Congress did intend to cover people with contagious diseases under Section 504 and that Gene Arline fit the definition of a "person with handicaps" under that law. The Court also rejected the Justice Department's analysis, stating that it did not agree that:

> "in defining a handicapped individual under section 504, the contagious effects of a disease can be meaningfully distinguished from the disease's physical effects on a claimant . . . . It would be unfair to allow an employer to seize upon a distinction between the effects of a disease on others and the effects of a disease on a patient and use that distinction to justify discriminatory treatment."[7]

In so ruling, the Court explicitly rejected the analysis of the Justice Department and reaffirmed the protection of the Rehabilitation Act for people with contagious diseases.

As the court below had done, the Supreme Court also noted that the Rehabilitation Act included the requirement that an individual with a contagious disease must be "otherwise qualified." In order to meet that requirement, according to the Court, the individual could not pose a significant risk of communicating the infectious disease to others in the workplace, which risk could not be eliminated by a reasonable accommodation. This ruling by the Court was in accord with longstanding caselaw under Section 504.

B. CIVIL RIGHTS RESTORATION ACT OF 1987

In March 1988, the Senate and House overrode President Reagan's veto and passed the Civil Rights Restoration Act of 1987. This bill overturned the Supreme Court's decision in *Grove City College* v. *Bell*,[8] which had placed a limited definition on the term "program or activity" — a term which appears in four statutes that prohibit discrimination by entities receiving federal financial assistance. One of the statutes positively affected by the broadening scope of the Civil Rights Restoration Act was Section 504 of the Rehabilitation Act of 1973. Thus, the Civil Rights Restoration Act was of critical importance to all people with disabilities, as well as to various other groups affected by the civil rights statutes.

Efforts were made by various Members of Congress, during passage of the Civil Rights Restoration Act, to eliminate protection for people with HIV disease under the Rehabilitation Act. All of these efforts were defeated. Instead, an alternative amendment was adopted which codified the "otherwise qualified" standard of Section 504 for all people with contagious diseases. This amendment was designed to reassure employers that people with disabilities, including people with contagious diseases, would not pose a "direct threat" to the health or safety of others in the workplace. At the same time, the provision maintained protection for people with contagious diseases, including people with HIV disease, who did not pose such health threats to others.

C. THE FAIR HOUSING AMENDMENTS ACT OF 1988

In August 1988, Congress passed the Fair Housing Amendments Act of 1988. The Fair Housing Amendments Act represented a giant step forward in advancing the civil rights of people with disabilities. For the first time, anti-discrimination protection for people with disabilities was extended *outside* of the *public* sector. Under the bill, discrimination in housing was prohibited on the part of *all private* individuals and entities, not simply on the part of those individuals or entities who receive federal funds, the scope of protection that had been provided by Section 504. Thus, under the Fair Housing Act, as now amended, private landlords and homeowners could no longer discriminate against people with disabilities in the sale, rental or terms or conditions of sale or rental of housing. In addition, they could no longer discriminate against those who associated with people with disabilities.

Various efforts were again made to exclude people with HIV disease from these new non-discrimination housing protections. Again, those efforts were defeated and an alternative provision was adopted which clarified that the law did not require that housing be made available to any person with a disability who posed a "direct threat" to the health, safety, or property of others. The Fair Housing Amendments Act, as currently signed into law, thus protects all people with disabilities from housing discrimination, including people with HIV disease.

D. THE AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA), introduced in the 101st Congress in May 1989, was passed by the Congress and signed into law by the President in July 1990. The ADA prohibits discrimination against people with all disabilities, including people with HIV disease, in the areas of employment, public accommodations, transportation, public services, and telecommunications. The ADA represents a major breakthrough in the establishment of basic civil rights protection for people with all disabilities, including people with HIV disease.

The provisions of the ADA can be best understood as deriving from two laws: the Rehabilitation Act of 1973 and the Civil Rights Act of 1964. The substantive provisions of the ADA, which prohibit discrimination on the basis of disability in employment, in services and goods offered by private businesses, and in activities of state and local governments, stem from the substantive provisions of title V of the Rehabilitation Act of 1973. Thus, issues such as what constitutes "discrimination" on the basis of disability, or what is required as a "reasonable accommodation" in employment, are derived from similar requirements which have existed for over fifteen years under the Rehabilitation Act.

The procedural requirements of the ADA, by contrast, are drawn primarily from Title II and Title VII of the Civil Rights Act of 1964. Title II prohibits discrimination on the basis of race, religion, and national origin on the part of various private businesses; Title VII prohibits discrimination on the basis of race, sex, religion or national origin on the part of employers with fifteen or more employees. One of the purposes of the ADA was to finally establish parity in federal civil rights laws between people with disabilities and other minorities and women. Thus, many of the procedural requirements of the ADA are drawn from the Civil Rights Act of 1964.[9]

Because the ADA's substantive definitions and requirements are drawn from the Rehabilitation Act, people with HIV disease are covered under the ADA, just as they are covered under the Rehabilitation Act. The Bush Administration's support for the ADA thus effectively translated into support for anti-discrimination protection for people with HIV disease.

The ADA also includes an expansion of coverage from the Rehabilitation Act. Experience over the years had proven that people who are simply friends or relatives of people with disabilities are sometimes discriminated against because of their association with a person with a disability. As noted, when Congress passed the Fair Housing Amendments Act of 1988, it added protection for people who associate with people with disabilities.[10] Congress added that same protection in the ADA.

There were various efforts made, during the legislative process, to restrict this provision to individuals who associate with people with disabilities through marriage, blood, or caregiving relationships. All of these restrictive efforts failed. The provision, therefore, extends broad protection to any individual who is a friend of, who lives with, who cares for, or who otherwise has an association with, for example, a person with HIV disease.

There was a direct challenge made to the coverage of certain people with HIV disease during passage of the ADA. Towards the end of legislative consideration of the bill, an amendment was added which allowed employers to transfer an employee with a "contagious disease" from a food-handling position to a different position, even if the employee did not pose a health threat to others. The stated rationale for the provision, which was championed by the National Restaurant Association, was not that employees with certain contagious diseases, such as HIV disease, posed any real threat to the food supply, but that customers might *perceive* such a threat and would therefore boycott the business.

Interestingly enough, the same argument had been put forth by the National Restaurant Association in 1964, when it had argued that requiring restaurants to hire or serve African Americans would effectively result in an unacceptable loss of business. That argument did not prevail in 1964, and ultimately it did not prevail in the ADA. An alternative amendment was adopted, which required the Secretary of Health and Human Services to promulgate a list of contagious diseases that could, in fact, be transmitted through the handling of food and which allowed employers to refuse to hire individuals with those particular diseases for food-handling jobs. While the Bush Administration, through a letter issued by the Secretary of Health and Human Services officially opposed the initial amendment, it did not take a lead in seeking to remove the provision.

V. Confidentiality

A key to effective public health measures in this country, as well as a key to ensuring that the civil rights of people with HIV disease are protected, is the assurance that individuals who undergo HIV antibody tests will have the results of those tests kept confidential. The public awareness that an individual has tested positive on the HIV antibody test can often lead to discrimination in employment, housing, public accommodations and receipt of health care services. Even in those situations where some legal recourse might be available (e.g., in housing, in areas covered under Section 504, or in areas covered by the ADA when the law becomes effective), forcing individuals to undertake such legal suits is itself traumatic. In this area, an ounce of prevention in terms of initially ensuring the confidentiality of HIV test results is more than worth the pound of cure in terms of not forcing individuals on both sides to undergo expensive and difficult lawsuits.

The confidentiality of HIV test results are currently protected solely under patient-physician confidentiality provisions that might exist in particular states, and, in a few states, by specific statutes. There is no federal confidentiality law and there was no effort made to pass such a law during the 101st Congress. Congress did pass an omnibus AIDS care bill, which included a requirement that all States must have in place a system for ensuring the confidentiality of HIV test results performed in that State.[11]

VI. Mandatory Testing and Exclusion

The public health community has long advocated against mandatory HIV antibody testing in the United States, other than mandatory testing of donations of blood, plasma and organs. Public health officials have noted that testing low-risk populations (such as marriage license applicants or applicants to the military) represents a significant waste of financial resources, can result in a high rate of false positives, and is irrelevant in terms of an individual's ability to do a job or to be eligible for services or benefits. A better approach, advocated by public health officials, is an extensive program of education and voluntary testing.

Despite this consensus in the public health community, the Bush Administration has continued a number of programs of mandatory testing. All current members of and applicants to the military, the Foreign Service of the State Department and the Jobs Corp are required to undergo mandatory HIV antibody testing. Any applicant who tests HIV positive is denied admittance to the program or service. Prisoners in federal prisons are often required to undergo HIV testing as well.

Immigrants to this country had also been subjected to mandatory HIV testing and exclusion. Visitors to the country were not subjected to HIV testing, but could be excluded if they were known to be HIV infected. In the last days of the 101st Congress, Congress passed a major immigration reform act. As part of that law, Congress officially handed back authority to the Secretary of Health and Human Services (HHS) to decide whether HIV infection should be considered a "communicable disease of public health significance," warranting exclusion from this country for immigrants and visitors. Preliminary reports from the Department of HHS indicate that HIV disease will not be listed as such a disease.

The latest area where the issue of mandatory HIV testing and exclusion has arisen is that of HIV-infected health care workers. Following reports by the Centers for Disease Control (CDC), in the spring of 1990, of a possible transmission of HIV from a dentist to his patients, the CDC began moving towards promulgating new guidelines regarding HIV-infected health care workers. These guidelines could require the mandatory testing, and exclusion from practice, of selected health care workers. A wide range of public health organizations, health care provider organizations, AIDS service providers, and civil liberties groups have raised concerns with such proposed guidelines, arguing that they could have a major adverse impact on the access to and delivery of health care in this country. While all of the organizations involved believed that measures must be taken to protect patients from real, identifiable risks, there is concern that the hysteria surrounding this particular area should not result in public policy measures that do not accurately reflect the real risks at issue.

VII. Recommendations

1. THE AMERICANS WITH DISABILITIES ACT

The Bush Administration must place as one of its highest priorities the effective implementation of the Americans with Disabilities Act. This Act finally extends to people with disabilities, including people with HIV disease, protection against discrimination in the areas of private employment, transportation, public accommodations, communications, and state and local activities. The regulations to the law must now be issued, in a timely fashion, by the Equal Employment Opportunity Commission, the Department of Justice, the Department of Transportation, and the Federal Communications Commission—each of which has jurisdiction over a certain segment of the regulations. In addition, each of these agencies must provide strong and effective technical assistance to those with both rights and responsibilities under the law.

2. ENFORCEMENT

Section 504 of the Rehabilitation Act, and the Fair Housing Amendments Act, are both currently in effect. The enforcement arm of the Justice Department, as well as the enforcement arms of the other agencies, must be activated to pursue and prosecute cases of Section 504 violations against people with HIV disease. In addition, the Bush Administration should continue to actively enforce the provisions of the Fair Housing Amendments Act.

3. TRAINING AND EDUCATION

The Department of Justice, and other agencies within the government, have a responsibility of ensuring that attorneys and people with disabilities across the country are equipped to bring Section 504 cases, in the area of HIV disease, as well as in the area of other disabilities. This responsibility of training and education of attorneys and affected parties is especially important following the passage of the ADA. The Bush Administration could ensure that such appropriate training and education takes place through contracts to existing AIDS service providers and legal organizations that currently offer services and training.

4. TESTING

The Bush Administration should review the usefulness and purpose of the current mandatory testing programs, with an eye towards eliminating or significantly modifying such programs. In addition, the Bush Administration should withstand pressure to require automatically mandatory testing and exclusion of HIV-infected health care workers. Instead, the Bush Administration should work with the public health, medical provider, union, AIDS advocate, and civil rights communities to craft guidelines regarding HIV-infected health care workers that appropriately protect both the public and the health care worker.

Chapter XIII

Federal Fair Housing Enforcement Under President Bush: An Assessment at Mid-Term and Recommendations for the Future

by John P. Relman

I. Introduction

The passage of the Fair Housing Amendments Act of 1988 represents the single most important development in the area of fair housing since 1968, the year the Fair Housing Act was first passed. In the two years it has been in power, the Bush Administration has repeatedly declared that the enforcement of the new fair housing law ranks among its most important priorities. According to spokespersons at the Department of Housing and Urban Development (HUD) and at the Department of Justice (DOJ), the officials charged with implementing the new law have reportedly received a clear mandate from the White House to pursue a policy of aggressive enforcement.[1]

Professor Schwemm and others have exhaustively surveyed the general state of fair housing law as of 1988, and insightfully analyzed the Reagan administration's unfortunate lack of commitment to fair housing.[2] The purpose of this chapter is not to re-trace what they have done. Rather, this chapter attempts to pick up where Professor Schwemm has left off. The focus here is upon the performance of the Bush Administration during its first two years in office, and the extent to which the new Administration has fulfilled its promise to make fair housing a priority.

Before President Bush took office in 1989, Professor Schwemm identified a number of areas where the prior administration had proven deficient in its enforcement efforts, and offered a number of specific recommendations for improving the state of fair housing enforcement.[3] Summarized briefly, those recommendations included the following:

(1) The appointment of individuals to key posts at HUD and Justice who have demonstrated a strong commitment to principles of fair housing, and an insistence upon higher levels of funding to allow for proper enforcement of the new Act;

(2) Re-establishment of the Department of Justice's historic leadership role in developing and prosecuting a variety of new cases and advocating a broad and generous interpretation of the Fair Housing Act;

(3) Improving the working relationship between HUD and DOJ and private fair housing organizations and civil rights advocacy groups;

(4) Re-evaluating or rescinding the Department of Justice's policies with respect to disparate impact theory, race-conscious methods of fostering housing integration, land-use cases, and settlement;

(5) The immediate issuance by HUD of new interpretive regulations for the Fair Housing Amendments Act and the Fair Housing Initiatives Program;

(6) Re-evaluation by HUD of its policies with respect to its affirmative Section 808 duties and its approach to race-conscious remedial programs in public housing;

(7) The development by HUD of an effective outreach program designed to encourage victims of housing discrimination to file complaints;

(8) A renewed effort by HUD to collect and disseminate data on the nature and extent of housing discrimination in the United States, on the number and disposition of complaints received by HUD, and on the demographics of tenants and beneficiaries of HUD programs; and

(9) A renewed effort by HUD to encourage state and local governments to enact or amend their fair housing laws to achieve "substantial equivalency."

Although a number of difficult issues have yet to be resolved, the Bush Administration's fair housing enforcement efforts reflect a substantial change from the Reagan years. Many of the recommendations set forth above have been followed, and there are encouraging signs in other areas. As discussed in detail below, the Department of Justice has tripled its caseload, adopted a more expansive approach to the interpretation of the Fair Housing Act, aggressively pursued higher damage awards and stronger injunctive relief, improved its working relationships with private fair housing organizations, and softened its prior stance on disparate impact theory and race-conscious integration programs.

Likewise, HUD has tripled its caseload, issued final interpretive regulations, and submitted reports to Congress documenting the number and type of complaints and conciliations completed and the race, sex, and ethnic origin of HUD program participants and beneficiaries. HUD has modified its interpretation of the requirements of the FHIP program, distributed more than $3,000,000 in FHIP funding to private fair housing organizations, and used its new powers under the Fair Housing Amendments Act to seek higher damage awards.

Significant problems remain. The number of complaints received by HUD is still not as large as it should be given the broad new protected classes included in the new Fair Housing Act. HUD has, to date, proven unable to complete its investigations and reasonable cause determinations within the statutorily mandated 100-day time period. A sizable backlog of cases has developed, which threatens to undermine the entire federal enforcement effort by both HUD and DOJ. Equally important, certification of substantial-equivalent states and localities is far behind schedule. The consequences for HUD's backlog could become serious in 1992.

Likewise, although there has been improvement, neither HUD nor DOJ has succeeded in winning damage awards that compare with the best of the settlements obtained in private sector fair housing cases. HUD has yet to make any meaningful use of its new powers under the Fair Housing Amendments Act to file Secretary-initiated cases, and has failed to complete a new national study identifying the level of housing discrimination across the country. DOJ's response to important case referrals submitted by private organizations has been somewhat erratic, and although the Department has aggressively pursued "garden variety" cases, in recent months the number of new, complex "pattern or practice" cases undertaken by the Department has dwindled. Finally, while both HUD and DOJ appear to have softened their positions with respect to disparate impact theory and race-conscious integration programs, it remains to be seen whether the Reagan policies will actually be rescinded. To date those policies have essentially been placed on hold.

All of these developments are discussed in detail below. Part II discusses HUD's new enforcement responsibilities under the Fair Housing Amendments Act and analyzes the degree of success that the Department has had in implementing those new duties. Part III discusses the Department of Justice's role in the enforcement process, and examines its performance to date. Conclusions and recommendations are set forth in Part IV.

II. Department of Housing and Urban Development

A. INTRODUCTION

The Fair Housing Amendments Act of 1988 gave the Department of Housing and Urban Development (HUD) dramatically new and important responsibilities for fair housing enforcement. An informed and objective evaluation of HUD's performance during the first two years of the Bush Administration requires a careful examination of the manner and effectiveness with which HUD has discharged those responsibilities. This analysis, in turn, requires at the outset a brief review of the new statutory provisions and the responsibilities they place on HUD.

Under the new Fair Housing Act, HUD for the first time has significant enforcement power, and must exercise that power within relatively stringent time deadlines. First, upon receiving a complaint alleging a discriminatory housing practice, HUD has 100 days to conduct its investigation, complete a final investigative report, and make a reasonable cause determination.[4] Second, if HUD determines that reasonable cause exists, it must issue a charge on behalf of the aggrieved person. The aggrieved person and the respondent then have twenty days from the filing of the charge to decide whether to have the case prosecuted by the Department of Justice in federal court. If neither party elects this option, the charge will be prosecuted by HUD's General Counsel on the aggrieved person's behalf before an administrative law judge (ALJ).[5]

Third, if a DOJ election is not made and the case proceeds before an administrative law judge, the ALJ must initiate a hearing within 120 days after the filing of the charge. At the hearing the parties are entitled to present evidence and cross-examine witnesses. HUD's Office of General Counsel is required to represent the aggrieved party during the proceeding.[6]

After the hearing, the ALJ has sixty days to issue a decision and findings of fact. If the ALJ determines that a respondent has committed a discriminatory housing practice, the ALJ must order "such relief as may be appropriate."[7] Relief may include compensatory damages, injunctive or equitable relief, and civil penalties for "vindication of the public interest."[8] The civil penalties range from $10,000 to $50,000 depending upon whether the respondent has committed a prior discriminatory housing practice, and the seriousness of the violation.[9]

If at any time after the filing of the complaint HUD concludes that prompt judicial action is required, the new Act permits the Secretary to authorize DOJ to initiate a civil action in federal court to seek temporary or preliminary injunctive relief that would remain in effect until the complaint is resolved.[10]

Fourth, under the new Act the Secretary is empowered to initiate complaints.[11] As a practical matter this means that HUD can use its vast resources to enforce the law in areas where those resources are needed most. If the Secretary concludes, for example, that lending discrimination by banks or discriminatory advertising are growing problems, or that the two new protected classes — families with children and the disabled — are not receiving the attention they deserve, the Secretary now has statutory authorization to initiate its own complaint to further a HUD enforcement strategy.

Fifth, the 1988 Amendments toughen the standards that state and local governments must meet if they are to be certified as "substantial equivalents," but leave with the Secretary the sole power to determine which new state and local fair housing laws will qualify for certification. This development is important, for as of January 1992, HUD will only be required to refer complaints arising within a particular jurisdiction to that state or locality for investigation and processing if the jurisdiction in question has passed legislation that is sufficiently similar to the federal law to be considered a "substantial equivalent." Between now and January 1992, therefore, HUD will be responsible for reviewing substantial equivalency applications from close to thirty-eight states and eighty-four localities that have been "grandfathered" into the Amendments Act as substantial equivalents. States subject to the grandfather clause will lose their substantial equivalent status as of January 1992 if they have not been certified under the new law by that time.

Finally, the Amendments Act requires HUD to issue new rules and regulations interpreting the Act within 180 days of its enactment.[12] Likewise, the Amendments Act requires HUD to publish an annual report to Congress documenting the progress that has been made in eliminating discriminatory housing practices, and the number of investigations, determinations, and hearings that have not been completed within the time periods required.[13]

All of these new statutory powers and responsibilities became effective on March 13, 1989. Since that time, HUD has struggled to meet its obligations. The sections that follow assess in detail the degree of success HUD has had in implementing its duties in each of these new areas.

B. ENFORCEMENT: PRIVATE COMPLAINTS UNDER SECTION 3610

1. NEW COMPLAINTS RECEIVED

During the late years of the Carter Administration the number of fair housing complaints received annually by HUD rose steadily. In 1982 the number peaked at approximately 5,000. During the last six years of the Reagan Administration, however, the number of complaints received annually fell back to the 4,000-5,000 range.[14] This number was stunningly low, given HUD's own estimate that 2,000,000 instances of housing discrimination were occurring every year.[15] In effect, less than one-fourth of one percent of the total number of instances of discrimination were resulting in complaints to HUD.

During 1989, the first year of operation for the new Fair Housing Act, the total number of complaints received by HUD and substantially equivalent state and local agencies jumped dramatically. The annual total for 1989 reached 7,174, a significant increase from the 4,422 complaints received in 1988. The 1989 total represents the largest number of complaints ever received by HUD and state and local agencies in a single year.[16]

Because virtually all of the substantially equivalent agencies grandfathered into the new Act did not — at the time the Act was passed — offer protections for families with children and the disabled, HUD decided to retain exclusive jurisdiction of all complaints alleging discrimination in those two areas. When the 7,174 complaints are broken down into "HUD" complaints (that is, complaints over which HUD retains exclusive jurisdiction), and state and local complaints (complaints over which state and local agencies retain jurisdiction subject to the Fair Housing Act's referral requirements),[17] the numbers become somewhat more telling. HUD complaints tripled, rising from 1,255 in 1988 to 3,952 in 1989, while state and local agency complaints stayed roughly the same, increasing only slightly from 3,167 to 3,222. Examined on a monthly basis, from March 12, 1989 (the effective date of the new Act) until the end of that year HUD received an average of 387 complaints per month, compared with an average of 105 complaints per month in 1988 and 83 complaints per month in the first two months of 1989.[18]

The reason for the dramatic increase in HUD complaints is fairly obvious. The increase reflects the expansion of the Fair Housing Act to include protections for families with children and the disabled. Of the 3,758 HUD complaints received between March 12, 1989 and the end of that year, seventy per cent involved familial status or handicapped claims.[19] Over half of the complaints (51%) included at least one claim of discrimination based on familial status. Race-based claims were the second most common, followed by handicap, sex, color, national origin, and religion, in that order.[20]

While the increase in the overall number of complaints demonstrates movement in the right direction, it is hardly unexpected given the expanded coverage of the Fair Housing Amendments Act, and the new opportunities for obtaining damages, injunctive relief, and civil penalties through HUD without incurring attorneys' fees or costs.

Indeed, given the extent of the discrimination that is believed to exist against families with children and the disabled,[21] and given HUD's own estimate of 2,000,000 instances of discrimination per year exclusive of familial status and handicap claims, it is surprising that the number is not significantly higher. Viewed as a percentage of the number of instances of discrimination believed to occur annually, the 1989 complaints received by HUD represent only slightly more than one-third of one percent of these 2,000,000 instances. That percentage reflects only a minor increase from the pre-Act period, during which time — as noted above — less than one-fourth of one percent of the 2,000,000 instances of discrimination resulted in complaints to HUD.

This may represent progress, but clearly there is still a long way to go. The need for an effective outreach and public information program to educate aggrieved and potentially aggrieved persons about the HUD complaint process remains as pressing as before.[22]

2. TIMELINESS OF INVESTIGATIONS AND REASONABLE CAUSE DETERMINATIONS

Faced with an increase in the rate of new complaint filings, HUD has demonstrated a continuing inability to process complaints and complete investigations in a timely manner. Approximately six months after the new Act became effective, HUD came under a withering barrage of criticism from private fair housing organizations and private fair housing attorneys for failing to adhere to the 100-day time limits for completing investigations and making reasonable cause determinations.[23] HUD spokespersons gave various reasons for the backlog, but the bottom line was that many complaints were simply not moving through the system in as prompt a manner as had been anticipated. Directors of several private fair housing organizations stated publicly that they were disinclined to file complaints with HUD because cases were simply not being processed in anything close to 100 days.[24]

Although HUD appears to have made a concerted effort in recent months to reduce the backlog, HUD's own statistics reveal that only 23% of the complaints filed between March 12, 1989 and the end of that year were closed within the 100-day time limit. Fifty-three percent of the complaints were either still pending after 100 days, or were closed at some point after pending for more than 100 days.[25] The remaining 24% were still pending at the end of 1989, but were less than 100 days old.[26]

These figures are troubling for several reasons. First, if the backlog is a problem now, the recent increase in complaint filings suggests that it will only worsen. Unless HUD significantly improves the efficiency of its investigations, another increase of filings equivalent to that experienced in 1989 will make it virtually impossible for HUD to comply with the 100-day deadline on a consistent and predictable basis.

Second, failure to comply with the 100-day time limit may severely hamper the Department of Justice's ability to carry out its enforcement obligations. As discussed above, the Department of Justice is charged with representing complainants who elect to have their case adjudicated in federal court. If a bottleneck forms in the pipeline that begins at HUD, enforcement resources at the Department of Justice are wasted. For DOJ effectively to fulfill the role envisioned for it under the new Act, cases must move quickly through the investigation process to a determination of reasonable cause.

Third, processing delays defeat one of the central purposes of the new Act, which is to provide an easily accessible, inexpensive, and expeditious adjudication process for potential victims of housing discrimination who cannot otherwise afford representation. Repeated failure to meet the 100-day limit will invariably have the effect of discouraging potential victims from filing complaints and seeking relief through HUD.

In recent months, HUD has taken several steps to relieve the backlog. Effective January 28, 1991, the Office of General Counsel (OGC) relinquished sole authority to make reasonable cause determinations. That power has been delegated in part to counsel in HUD regional offices, and in part to investigators in the Office of Fair Housing Enforcement (FHEO). FHEO, which is comprised of non-lawyers, now has authority to make determinations only of "no reasonable cause." Allowing FHEO to make these determinations will likely have the effect of weeding out frivolous cases and saving the Office of General Counsel considerable time. Similarly, delegation to regional counsel will enable HUD to enlist the services of between twenty and forty additional attorneys.

Whether these measures actually succeed or merely shift the location of the bottleneck within HUD's bureaucracy remains to be seen. Although the Office of General Counsel intends to retain sole jurisdiction over cause determinations in complex cases, the delegation plan does pose certain dangers. Permitting non-lawyers to make "no reasonable cause" determinations may lead to improper complaint dismissals for which there is no opportunity for review by legally trained HUD personnel. In addition, it is unclear whether HUD regional counsel will have sufficient expertise and experience interpreting the new federal law and regulations to make determinations that satisfy OGC's standards.

3. CASE DISPOSITION

a. Conciliation

Under both the original Fair Housing Act and the amended Act, HUD must "engage in conciliation ... beginning with the filing of [the] complaint and ending with the filing of a charge or a dismissal by the Secretary."[27] During the Reagan Administration, HUD's efforts at conciliation proved dismal. Damages obtained per successful conciliation averaged about $700. In no year during the Reagan Administration did the number of housing units obtained through conciliation exceed 500.[28]

The Fair Housing Amendments Act of 1988 has unquestionably improved HUD's ability to conciliate. The monthly average of successful conciliations has jumped from seventeen in 1988, to eighty-nine during the ten months of 1989 following the effective date of the new Act. The average compensation obtained per successful conciliation has also increased from $1,385 in 1988 to $1,945 in post-Act 1989. Likewise, the number of housing units obtained through conciliation improved from forty-seven in 1988 to 222 in post-Act 1989.[29]

These numbers, while encouraging, do not necessarily tell the full story. Under the new Act, prosecution by HUD or DOJ is a certainty if reasonable cause is found, and the penalties available for violations of the Fair Housing Act are far more severe than before. With the threat of prosecution and unlimited monetary exposure hanging over the respondent, it is to be expected that the number and quality of settlements would improve.

The real question is why the success rate and the amount of compensation recovered have not been even higher. Although the monthly average of successful conciliations rose from seventeen to eighty-nine in post-Act 1989, considerably more complaints were filed in that latter period. A better measure of HUD's progress, therefore, might be found in a comparison of the percentage of complaints filed in 1988 and 1989 respectively that resulted in successful conciliation agreements. That comparison reveals that of the 1,255 complaints received by HUD in 1988, approximately 16% resulted in successful conciliations, while during post-Act 1989, the success rate rose only slightly to 22.5%. Viewed from this perspective, HUD's conciliation statistics are not as impressive as they might first appear. Notwithstanding the sharp increase in the monthly average, the total number of complaints received is sufficiently large to suggest that the numbers could, and indeed should, have been significantly higher.

The same might be said for the amount of compensation recovered in the average conciliation. The average monetary settlement in post-Act 1989 reflected an increase of almost $600. But that amount is still low in light of the rapidly escalating damage awards and settlements achieved over the last four years in private fair housing litigation.[30] Indeed, that amount is surprisingly low when compared with recent damage awards ordered in the last year by HUD's own administrative law judges.[31]

To be fair, HUD has successfully conciliated several cases requiring respondents to pay as much as $60,000 in damages.[32] But those cases are the exception, not the rule. Indeed, because those settlements are so radically different from the median, it could be argued that those settlements are responsible for a misleading inflation of the post-Act 1989 average. By the same token, the conciliation statistics obviously include cases that were frivolous when filed and are ultimately settled for nothing more than nuisance value. Without knowing whether the conciliated cases are representative of the total number of HUD complaints filed and prosecuted, it may be that there simply is not a sufficient factual basis upon which to conclude that the amount of compensation recovered in the average conciliation is unacceptably low.

b. State and Local Referrals

As discussed above, under both the old version of the Fair Housing Act and the new amendments, complaints received by HUD must be referred to state and local agencies whose fair housing laws have been determined by HUD to be "substantially equivalent" to Title VIII. Under the Reagan Administration, the number of complaints retained by HUD flattened out as more and more cases were referred to state and local agencies for processing. This trend raised concerns that the Reagan Administration was too eager to abandon federal enforcement of Section 3610 cases, and had compromised the enforcement effort by certifying some state and local agencies who were not, in fact, providing substantially equivalent rights and remedies.[33]

The Fair Housing Amendments Act responded to this problem by allowing HUD to certify a state or local agency only if that agency provides substantive rights, procedures, remedies, and the opportunity for judicial review equivalent to that provided under Title VIII.[34] Because states and localities that had already been certified at the time the new Act became effective were permitted to retain certification for a forty-month grace period while their laws were amended to bring them into compliance with the federal law, HUD had no choice but to retain all complaints involving familial status and handicap claims for the duration of the forty-month period. At the time the new Act became effective, state and local agencies simply did not have laws in place to provide relief for members of these new protected classes.

This, however, has created a new problem. Congress concluded that forty months would be sufficient time to allow states and localities to amend their laws. Halfway through the forty months, only six jurisdictions have submitted new laws to HUD for certification. And of that number, only three — Texas, North Carolina, and South Carolina — have been certified as substantially equivalent.

If this trend continues, HUD is going to find itself in a very difficult predicament twenty months from now. Unable to refer complaints to states and localities no longer deemed to be substantial equivalents, HUD will be inundated with new complaints. The backlog that exists now is minuscule compared with that likely to develop if certification is not completed by 1992 as expected.[35]

It is essential that HUD not relax the standards that it has used up until now to evaluate State requests for certification. To date HUD properly has insisted that State laws mirror the federal law in all respects before granting certification. HUD must be careful not to let anxiety over an approaching deadline result in dilution of the requirements for substantial equivalency.

At the same time, HUD must now concentrate on supplying State and local governments with as much assistance as possible in drafting legislation that will survive a substantial equivalency review. Those supporting legislative fair housing initiatives in States and localities should have the benefit of HUD's views on the proposed legislation before they are forced to do battle in the political arena, and if the legislation meets HUD's standards, HUD officials should be prepared to testify on behalf of the bill.

To its credit, HUD has taken a step in the right direction. Recently the Office of General Counsel announced that it will render one advisory legal opinion of a State's proposed fair housing legislation, provided that the review is sought by the fair housing agency or office that would be in charge of enforcing the law in that State if the legislation were passed.

C. SECRETARY-INITIATED COMPLAINTS

Since the Fair Housing Amendments Act became effective, HUD has filed only one complaint on its own initiative, and has yet to issue a reasonable cause determination with respect to that lone complaint. This omission is troubling, for there remain many areas of fair housing enforcement that have not received the attention they deserve.

Seventy-seven per cent of the new complaints received by HUD involved claims of discriminatory terms or conditions, refusal to rent, or a refusal to sell.[36] Misrepresentation, discriminatory advertising, blockbusting, and lending or finance discrimination claims have not been brought with anything approaching the same degree of frequency. These are, however, areas that demand an infusion of resources and investigation. Secretary-initiated complaints constitute an ideal means of focusing HUD's resources on these under-litigated issues. It is surprising that to date HUD has not taken advantage of its new enforcement powers to address these issues.

Part of the problem may lie with the time-consuming nature of the training and transition process that accompanied the passage of the new Act. HUD has been forced to expend considerable time and effort training investigators and devising new procedures to implement the Act. HUD's fair housing staff has traveled extensively around the country, providing advice, assistance, and guidance to regional HUD offices and state and local agencies about the requirements of the new law. Under these circumstances, it may be premature to criticize HUD for not having undertaken more than one Secretary-initiated complaint.

Recent signs have been encouraging. Last fall the Assistant Secretary for Fair Housing, Gordon Mansfield, publicly stated that Secretary-initiated cases in the areas of advertising, appraising, and lending will be a priority in the 1991 fiscal year. According to Mansfield, four new Secretary-initiated cases are currently "in process."[37] It remains to be seen, however, whether these cases actually materialize.

D. ADMINISTRATIVE HEARINGS

As of September 1990, HUD had issued an approximate total of seventy-five charges of reasonable cause since the new Act became effective. Initially, parties elected federal court enforcement through the Department of Justice in only about one-third of the cases charged. That rate has now jumped to nearly sixty per cent.

To date, six charges have led to administrative hearings and decisions by HUD administrative law judges. The outcomes have been mixed. Five of the six decisions have resulted in victories for the Secretary and the complaining witness, but only two of the five have produced significant monetary damage awards.

The first decision, *HUD v. Blackwell*,[38] set an impressive standard that none of the subsequent decisions has equaled. In *Blackwell*, Chief Administrative Law Judge Heifetz awarded over $44,000 in compensatory damages ($40,000 of which represented compensation for embarrassment, humiliation, and emotional distress) to a black couple in a discriminatory refusal to sell case in Georgia.

What made the decision noteworthy was not just the size of the compensatory damage award to the complaining witness (one of the largest in the country to date), but the breadth of the relief ordered. In addition to the compensatory damage award to the plaintiffs, Judge Heifetz ordered the respondent to pay a $10,000 civil penalty (the maximum amount permitted for a first offense) and imposed wide-ranging injunctive measures that included an order requiring the respondent to sell his home to the complainants. In an unprecedented step, Judge Heifetz then awarded the innocent white purchasers of the property over $20,000 in damages to compensate them for the embarrassment, humiliation, and emotional distress suffered when they were forced to vacate the premises.

As impressive as *Blackwell* may be in terms of the scope of relief ordered and the thoroughness of the legal analysis contained in the opinion, it appears not to have had the effect on subsequent ALJ decisions that had initially been anticipated. In a second race discrimination case involving overt racial remarks by a landlord and several clear acts of discrimination, *HUD v. Jerrard*,[39] the Administrative Law Judge awarded only $15,000 in compensatory damages. Likewise, in *HUD v. Murphy*[40] and *HUD v. Guglielmi*,[41] HUD administrative law judges awarded a combined total of $27,000, covering both compensatory damages *and* civil penalties, against respondents who had maintained mobile home park policies that discriminated on their face against families with children. And in the most recent case, *HUD v. Baumgardner*,[42] the HUD ALJ awarded a total of only $5,000 in damages against a respondent who had engaged in blatant sex discrimination against three complainants seeking to rent a house.

The *Murphy* decision is particularly surprising, for there the Judge limited the civil penalty award to only $2,000 in recognition of the respondents' "good faith" efforts to comply with the law, notwithstanding the Judge's conclusion — one page further on in the opinion — that the respondents had deliberately "executed their interpretation of the statute and regulations in a manner which discriminated against families with children."[43] It appears that certain HUD administrative law judges are operating on the erroneous assumption that proof of "malice" or "evil motive" is required before the full amount of a civil penalty can be assessed. This is plainly not what Congress intended.

Regardless of the outcome reached, all six decisions are carefully documented and analyzed, and lucidly drafted.[44] The *Blackwell* and *Murphy* decisions in particular accurately and faithfully articulate the relevant legal standards, relying on federal case law and the legislative history of the Fair Housing Amendments Act. The tone of *Blackwell* is consistent with the broad interpretation that the Fair Housing Act has been accorded by the federal courts since 1968. The *Murphy* opinion provides a highly useful statutory roadmap of the complex exceptions to the new families with children provisions of the Fair Housing Amendments Act.

In short, one can fairly fault several of these early decisions for the paucity of the awards, but not for the care and professionalism invested in the legal analysis.

E. HUD'S GENERAL RESPONSIBILITY FOR ADMINISTERING TITLE VIII

1. INTERPRETIVE REGULATIONS

Until last year, the subject of regulations had proved to be a sore point for HUD. Over a period of twenty years, dating back to the passage of the Fair Housing Act in 1968, HUD had repeatedly failed to produce interpretive regulations defining and explaining the provisions of Title VIII.[45] Indeed, HUD's record on this subject was so poor that Congress felt compelled to include a specific provision in the Fair Housing Amendments Act requiring HUD to issue regulations within 180 days after passage of the Act.[46]

HUD's turnaround over the course of the last 18 months has been impressive. First, HUD succeeded in publishing final regulations on January 23, 1989, well within the 180 days set by Congress. The regulations have, for the most part, drawn praise from all quarters for their quality and comprehensiveness. HUD's interpretations of most of the new Act's provisions seem to be consistent with the general tone and tenor of the legislative history, which presumes an expansive reading of the Act. HUD has, for example, concluded that individuals infected with the HIV or AIDS virus have a physical impairment covered by the Fair Housing Act; that buildings cannot be segregated into "adult only" and "family" sections; that families with children cannot be excluded from any floor of a high rise building; and that providers of hazard insurance are covered under the Fair Housing Act.

Second, HUD has made substantial progress in producing architectural accessibility guidelines, which are designed to implement the Fair Housing Amendments Act's requirement that multi-family housing available for first occupancy after March 13, 1991 be accessible to persons with disabilities. The first draft of these guidelines was published on June 15, 1990. The guidelines drew praise from disability rights groups and severe criticism from the building industry. The chief area of controversy concerns how steep the slope of the terrain must be before a builder will be exempted from accessibility requirements. To date, HUD has strongly advocated a broad definition that would maximize the number of units covered under the guidelines.

In recent weeks, however, the lobbying effort on behalf of the building industry has intensified, and HUD has delayed the release of final accessibility guidelines. The delay has only enabled the building lobby to redouble its efforts in opposing HUD's initial draft. It is imperative that HUD not back down in the face of the lobbying campaign, and issue final regulations consistent with its initial draft as soon as possible. The issue is important, for these regulations — once finalized — will shape the face of multi-family housing for years to come.[47]

2. RESEARCH AND DATA COLLECTION

As with interpretive regulations, the Reagan years marked a period of "virtual cessation" of meaningful research on housing discrimination.[48] For fair housing advocates and for Congress, HUD's inaction gave rise to enormous frustration. Congress had expressly directed HUD to undertake studies of housing discrimination in the 1968 Fair Housing Act, and studies that had been performed during the Carter Administration had proven enormously useful in designing new policies.[49]

In an effort to remedy past failings by HUD, the Fair Housing Amendments Act includes a new provision requiring HUD annually to "specify[ ] the nature and extent of progress made nationally in eliminating discriminatory housing practices ... [and the] obstacles remaining to achiev[e] equal housing," and to identify the number of instances in which investigations, determinations, or hearings are not completed in a timely manner.[50] In addition, HUD remains under a continuing obligation to make studies about the nature and extent of housing discrimination in representative communities across the country.[51]

The first annual report prepared pursuant to Section 808(e)(2) of the Fair Housing Amendments Act was completed in the fall of 1990. Although the report provides an assortment of statistics concerning the number and type of complaints received, successful conciliations, and charges issued, the report does not attempt to identify the obstacles that stand in the way of further progress toward the goal of fair housing, and does not offer recommendations for additional legislative or executive action. Equally important, the report does not fulfill HUD's continuing obligation under Section 808(e)(1) to "make studies with respect to the nature and extent of discriminatory housing practices" around the country.[52]

At the same time that the first annual report on the "State of Fair Housing" was issued, HUD published a second report prepared pursuant to Section 808(e)(6) that provides data about the race, sex, ethnicity, handicap, and family characteristics of HUD program participants and beneficiaries.[53] This report, like the "State of Fair Housing," has been awaited eagerly for a number of years, and should provide invaluable assistance in enforcing Title VIII and other laws that proscribe discrimination in public housing.

Overall, the reports represent a significant step in the right direction. HUD now must concentrate both on developing and completing the type of housing discrimination surveys that proved so useful during the Carter Administration, and on fulfilling its statutory obligations to recommend additional legislative or executive steps that will address the remaining obstacles.

3. THE FAIR HOUSING INITIATIVES PROGRAM AND TESTING

As part of the Housing and Community Development Act of 1987,[54] Congress authorized the expenditure of $5,000,000 annually over a period of two years through the Fair Housing Initiatives Program (FHIP) to fund local fair housing efforts. Negotiations over the initial implementation of the program and issuance of regulations became ensnared in a hotly contested debate over so-called "testing guidelines" that were to be imposed on all recipients of FHIP funds.

Fair Housing advocates protested that the guidelines would effectively undermine fair housing testing and thereby deny needed funds to the most deserving local fair housing organizations.[55] Although the testing guidelines were ultimately dropped from the regulations promulgated to implement the FHIP program, the Reagan Administration continued to support the testing restrictions at the center of the controversy.

The Bush Administration has, to its credit, distanced itself from the initial battle over FHIP funding. Insistence on testing restrictions has been modified, and HUD has, in 1989 alone, awarded over $3,000,000 in much needed FHIP funds to forty private fair housing organizations in twenty-four States across the country. This money has been used to expand and maintain testing programs in dozens of metropolitan areas where housing discrimination remains a serious and intractable problem.[56]

F. HUD'S AFFIRMATIVE DUTIES UNDER SECTION 808

The Reagan Administration's unfortunate record of ignoring its affirmative obligations under Section 808 of the Fair Housing Act to administer HUD programs in a manner that promotes the policies and purposes of Title VIII has been carefully reviewed by Professor Schwemm and need not be repeated here.[57] For the most part, the advent of the Bush Administration has changed relatively little with respect to Section 808 enforcement. Four recent developments, however, deserve mention.

First and most important, last September a settlement was reached in *Walker v. HUD*,[58] a suit initially brought to challenge racial segregation in HUD-funded public housing projects in metropolitan Dallas, Texas. The settlement, embodied in a consent decree approved by a federal district judge, is unprecedented both in the size and scope of the remedy ordered. The cost of the settlement could exceed $118 million over the next eight years. The decree requires significant investment in neighborhoods surrounding certain West Dallas projects, and mandates the City of Dallas to establish a $22.5 million housing fund to help minorities obtain affordable low income housing in non-minority areas of Dallas County. In addition, the settlement requires the City of Dallas to fund a private, non-profit fair housing organization with contributions of $1.9 million over a period of eight years.

Second, in December 1990 the United States Court of Appeals for the First Circuit ruled that a federal district court judge in Providence, Rhode Island had erred in failing to approve a settlement reached between HUD, the City of Providence, and plaintiff tenants of two public housing projects. The settlement proposed in this protracted case, *Durrett v. Housing Authority of the City of Providence*,[59] required HUD to take far-reaching steps to renovate and modernize the projects to ensure that the buildings were "decent, safe, ... sanitary ... and free from discrimination."[60] In its opinion, the First Circuit concluded that the terms of the settlement were consistent with the affirmative duties imposed on HUD under the Fair Housing Act, and ordered the lower court to approve and implement the settlement.

Third, in January of 1991 a settlement in principle was reached in *NAACP, Boston Chapter v. Secretary of HUD*,[61] a case in which the plaintiffs had challenged HUD's failure to require the City of Boston to undertake a more effective fair housing program as a condition of receiving HUD funding. The settlement was achieved while the case was pending appeal following a judgment in the lower court for the plaintiffs. The settlement has not yet been submitted to the district court, and it is not clear whether the settlement will be approved. The terms of the agreement provide the plaintiffs with less than the full measure of injunctive relief ordered by the lower court at the conclusion of trial, but the settlement is still innovative and significant. The agreement would, in part, require HUD to provide $450 million in subsidized housing over a fifteen-year period; provide additional FHIP money to the City of Boston for fair housing enforcement; establish a metropolitan-wide clearinghouse administered by the Boston Fair Housing Commission to help minority families find housing in white neighborhoods; and eliminate a neighborhood "preference" policy implemented by the City that had operated to keep minorities out of low-income housing in certain areas.[62]

It is difficult to draw any definitive conclusions about the Bush Administration's approach to Section 808 enforcement on the basis of these three settlements. Each of the settlements came after protracted litigation, and two of the settlements were achieved only after court findings had been entered against the defendants. While the settlements are clearly important for the relief they provide to the plaintiffs, the fact that the cases were settled likely reflects nothing more about the Administration's intentions than an ability to recognize and accept the inevitable outcome of a particular piece of litigation, and a desire to staunch what had clearly become a pointless drain on the federal government's legal resources.

Fourth and finally, HUD has issued two policy statements in recent months with respect to public housing that are of some significance. HUD has rejected a proposal made by some housing authorities to exclude disabled persons from public projects reserved for older persons, and has declared that pregnant women and individuals holding legal custody of children under the age of eighteen are eligible for public housing earmarked for families.[63] HUD and the Administration deserve credit for these policy decisions, for they suggest a willingness to apply Title VIII's new familial status and handicap regulations with equal care to the public and private sectors.

III. The Department of Justice

A. INTRODUCTION

As with HUD, the Fair Housing Amendments Act has given the Department of Justice (DOJ) significant new enforcement powers. In addition to its existing authority to bring pattern or practice suits or cases involving "an issue of general public importance," the Department now has authority to prosecute in federal court civil actions arising out of complaints filed with HUD, to seek monetary damages and civil penalties in all of the cases that it brings, and to prosecute zoning and land-use cases referred to it by HUD.[64] In addition, the Department has new authority to seek prompt judicial action in cases where HUD determines that immediate intervention is necessary, and to prosecute criminal cases involving interference with or intimidation of individuals exercising their fair housing rights.[65]

The Department of Justice's response to the new mandate provided by Congress has, for the most part, been swift and impressive. The first two years of DOJ enforcement of the Fair Housing Amendments Act under the Bush Administration have reflected a renewed commitment to principles of fair housing, vigorous litigation on most levels, and a string of encouraging settlements. By most standards of measure, the Housing and Civil Enforcement section of the Bush Justice Department, under the leadership of Paul F. Hancock, has performed an about-face from the Reagan years.

B. NEW CASES FILED

Between 1981 and 1987, the core of the Reagan years, the Justice Department filed a total of seventy-one new fair housing cases. Broken down by year, DOJ filed an average of ten new cases per year. During those seven years, the number of cases filed in a single year never exceeded eighteen.[66]

During 1989 and the first half of 1990, the Department of Justice filed forty-eight new cases, and to date has joined ten more as amicus curiae (friend of the court). All but four of those new cases were filed after the Fair Housing Amendments Act became effective in March of 1989. In terms of a yearly average, the Department of Justice during the first eighteen months of the Bush Administration is filing new fair housing cases at a rate of thirty-three per year, a rate that exceeds anything achieved at the Department since 1976.[67]

C. TYPES OF CASES FILED

During the first sixteen months following the passage of the Fair Housing Amendments Act, these new cases fell largely into two categories: pattern or practice race discrimination cases, and pattern or practice familial status cases. The Department filed roughly eleven familial status pattern or practice suits, and ten racial discrimination pattern or practice suits.[68] The remainder of the new filings raised claims primarily of handicapped discrimination, although the Department has also filed a handful of cases alleging sex discrimination.[69]

During the first six months of enforcement after passage of the Act, election cases derived from HUD complaints constituted only a small percentage of the new case filings. A total of two election cases were filed during that six month period. Between October of 1989 and September of 1990, however, the filing of election cases jumped dramatically. Nineteen election cases were filed by DOJ during this period, and since October of 1990 twenty-two additional election cases have been filed. The bulk of these election cases have involved familial status claims.

A closer examination of the type of suits filed and the relief obtained reveals four important developments.

1. AGGRESSIVE INTERPRETATION OF THE NEW ACT

First, DOJ has shown signs of reasserting its traditional leadership role in aggressively seeking expansive and progressive interpretations of various statutory provisions of the new Fair Housing Act.

In *NAACP v. American Family Mutual Insurance Co.*,[70] for example, the Department filed an amicus brief arguing that racial redlining in the provision of property insurance was covered under the Fair Housing Act. Likewise, in *Briceno v. United Guaranty Residential Insurance Co.*,[71] the Department filed an amicus brief contending that private mortgage insurance companies were covered under the Fair Housing Act.

In *Pinchback v. Armistead Homes Corp.*,[72] the Department filed an amicus brief in support of the plaintiffs' position that the "futile gesture doctrine" could be applied in a housing discrimination case. The "futile gesture doctrine" is an important legal concept used in civil rights cases that enables a plaintiff who has not actually applied for a job or a home to bring a claim where the evidence suggests that the defendant's discriminatory practices would have made such an application nothing more than a "futile gesture."

In *United States v. Rent America, Corp.*,[73] the Department convinced a federal district court in Florida that the monetary damage provisions of the new Act can be applied retroactively to discrimination that occurred before the new Act became effective. The Department persuaded the same court that the term "monetary damages," as used in Section 3614 of the new Act, entitles DOJ to seek an award of both compensatory damages for emotional distress, and punitive damages, in a pattern or practice case.[74] And in *Gorski v. Troy*,[75] the Department filed an amicus brief asserting that applicants for a foster parent program are covered under the familial status provisions of the new Act even if they do not have children living with them at the time the discrimination occurs.

The Department has been particularly successful in litigating questions concerning the scope of the handicap provisions of the new Act. In a recent set of related cases filed in Virginia, Justice won a landmark decision holding that the definition of "handicapped" under the Fair Housing Amendments Act includes recovering alcohol and drug abusers. In *United States v. Southern Management Co.*,[76] the defendants refused to rent apartments to recovering drug and alcohol abusers who had successfully completed a residential treatment program and abstained from illegal drug use for one year. After the landmark pre-trial ruling by the court, the Justice Department won the ensuing jury trial which resulted in an award of $10,000 in compensatory damages, $26,000 in punitive damages, and a $50,000 civil penalty.[77]

DOJ has also been particularly active and successful in challenging zoning ordinances that discriminate against individuals with disabilities. In *United States v. City of Chicago Heights*,[78] the Department won a precedent-setting settlement requiring the City of Chicago Heights to permit the construction of a group home for fifteen mentally retarded adults. The City had denied the construction of the group home pursuant to a local zoning law. The settlement included an award of $45,000 in damages to the company that intended to build the home and to its future residents.

Similar challenges to local zoning ordinances in Pennsylvania have resulted in two impressive victories. Both cases, *United States v. Moon Township*[79] and *United States v. Schuylkill Township*,[80] involved zoning ordinances that defined "family" or "group residences" in such a way as to exclude living arrangements for disabled persons.

Other zoning challenges are pending. In a precedent-setting Wisconsin case, *United States v. Village of Marshall*,[81] the Department has alleged that the defendant town's refusal to waive application of its zoning ordinance on behalf of a residential home for mentally ill adults violated the Fair Housing Act because it constituted a discriminatory refusal to make a "reasonable accommodation." Likewise, in *United States v. Borough of Audubon, New Jersey*,[82] the Department of Justice has challenged the use of zoning laws to harass and intimidate the operators and residents of a home for recovering substance abusers.[83]

2. WILLINGNESS TO LITIGATE

Second, although many of the Department's new cases have involved routine "garden variety" discrimination claims, DOJ appears to have backed away from its former policy of overvaluing settlement as the preferred technique for resolving Title VIII cases. This has had the beneficial effect of improving the Department's leverage in settlement. The Justice Department's willingness to take cases to trial, as demonstrated in the *Southern Management* cases, has resulted in monetary settlements that are beginning to push into six figures. In *United States v. River House Cooperative, Inc.*,[84] for example, Justice won a settlement that included a $235,000 damage award to be divided among six plaintiffs. In *United States v. Aubrey*,[85] DOJ won a $90,000 settlement that stands as the largest single settlement achieved in a fair housing case in the Southwest to date. While settlements in private fair housing cases have in recent years frequently reached the six-figure level,[86] settlements of this size are a first for the Department.

The Justice Department's settlements still leave room for improvement. Of the four highest monetary settlements achieved in familial status cases during the first eighteen months of the Bush Administration, three fell in a range of $25,000 to $42,000, and the highest failed to exceed $76,000.[87] Similarly, other than the $235,000 in *River House*, and the $90,000 *Aubrey* settlement, Justice has not won any other settlements in a race discrimination case that approach six figures. The remainder of the settlements have hovered in the $20,000 to $35,000 range.[88]

These settlement awards are, for the most part, comparable to awards obtained in garden variety private fair housing cases in the Midwest, South, and Southwest. These awards do not, however, compare favorably with results obtained in recent private fair housing cases filed in California and the Washington, D.C. metropolitan area. Settlements in these areas are escalating at a fast pace. In one recent California case, the parties settled a race discrimination claim for $450,000.[89] Two recent settlements in the District of Columbia have exceeded $300,000, and five additional cases in the District of Columbia have each settled for well in excess of $100,000.[90]

While the disparity between private sector settlements and government settlements could formerly be explained by HUD and DOJ's inability to seek punitive and compensatory damages under the Fair Housing Act of 1968, the Fair Housing Amendments Act has eliminated those differences. With punitive damages and civil penalties now available in government cases, DOJ has every reason to insist in its negotiations on the highest possible monetary damage award. The Department should place a priority on seeking and winning damage settlements that compete with those being won in California and the District of Columbia. Experience has demonstrated that large monetary settlements, and the publicity that accompanies them, are a uniquely effective deterrent.

Unlike private fair housing organizations, Justice does not have the authorization or the capacity to conduct fair housing testing in support of the cases that it initiates. The absence of testing evidence in some of DOJ's cases is one factor that may reduce the leverage that the Department can bring to bear in settlement negotiations and may explain the higher frequency of large awards in private suits. To the extent that the lack of testing evidence is a significant liability for the Department, it can be easily remedied by Administration support for the fair housing testing legislation now pending before Congress (legislation that would give Justice funding to do testing), or by a renewed commitment on the part of

DOJ to litigate more cases with private fair housing organizations that do have the capacity to test.

3. INJUNCTIVE RELIEF AND DAMAGES FOR PRIVATE FAIR HOUSING ORGANIZATIONS

Third, the Justice Department has not shied away from insisting on strong injunctive relief as a central component of settlement. Typically, recent Justice Department settlements have included training and reporting requirements, notice provisions, application procedures, advertising and outreach requirements, preservation of the right to inspect records, and general proscriptions against future discrimination.

This new policy has several important ramifications. By requiring defendants to engage in fair housing training and recordkeeping, the settlements reduce the likelihood of repeat violations going unnoticed. More important, the policy has the effect of drawing private fair housing organizations into a partnership with Justice. In some cases it is the private fair housing organizations that Justice calls on to do the training and monitoring of the decree.

Justice has had modest success in negotiating monetary awards for local private fair housing organizations as part of settlement so that the organization will have the resources needed to complete the monitoring and training. In *United States v. Cenvill Illinois Corp.*,[91] for example, a familial status case filed by the Department, Justice negotiated a settlement that required the defendant to pay a private Illinois fair housing organization $51,000 over a period of five years to compensate the organization for training and monitoring of the defendants' employees.

Even where money for training has not been included in the settlement, the Department has had some success in winning monetary damages for private fair housing organizations. In *Cenvill*, the settlement included $25,000 in monetary damages for the fair housing organization in addition to the payments discussed above for training. In *United States v. La Fonge Association*[92] and *United States v. Durham Woods Associates*,[93] two familial status cases filed by the Department of Justice in New Jersey, DOJ won consent decrees requiring the defendants to pay private fair housing organizations $50,000 in monetary damages.[94]

4. PROMPT JUDICIAL ACTION

Fourth, Justice appears to have placed a priority on pursuing prompt judicial action in emergency situations. In the first year after passage of the Fair Housing Amendments Act, Justice initiated eight cases seeking prompt judicial action on behalf of HUD complainants, and won relief in all eight cases.[95] A good example of the relief won by the Department in these cases is demonstrated by an Illinois case, *United States v. Tadesusz Bobak*,[96] where the Department obtained an injunction prohibiting the defendant from renting the apartment sought by the complaining family to anyone other than the complainants until it could be determined whether the fair housing laws had been violated.

This development is important, for it suggests that emergency relief may finally become quickly and easily available in garden variety cases. Until now, most complainants have simply not had access to legal resources fast enough to prevent an eviction or to prevent the house or apartment that they sought from being sold to an innocent third party pending the outcome of the suit.

Surprisingly, over the course of the last year the Department has not filed any new prompt judicial action cases. This development is not directly attributable to the Department, for DOJ is dependent on HUD to refer complaints for prompt judicial action. Precisely where the problem lies is not clear. Justice, however, should make every effort to encourage HUD and DOJ offices around the country to identify emergency cases and refer them immediately to the Department for prompt judicial action.

5. REFERRAL CASES

Although all of the developments associated with DOJ's new case filings discussed in Part III (C)(1-4) above have done much to promote a general warming of relations between the Department of Justice and private fair housing organizations and civil rights advocacy groups, DOJ has fallen somewhat short in its stated commitment to review cases referred by the private sector for possible Department intervention.

Some potentially precedent-setting private cases have been referred to DOJ for review in the hope that the Department will intervene in support of the private plaintiff. In certain instances these referrals have languished. Justice does not yet seem to have a mechanism in place to handle these referrals in an efficient manner, or to track their progress through the Department so that private parties can be kept informed of their status. Curiously, for all the enthusiasm with which DOJ has aggressively pursued a new docket of largely garden variety cases, in recent months the Department has not been quite as quick to jump into important, complex pieces of litigation referred from the outside.

To be fair, part of the problem may lie with lack of staffing. At present, Housing and Civil Enforcement operates with a staff of approximately thirty-three. The Department requested funding for approximately forty additional staff positions from Congress for the next fiscal year, but has received authorization for only a fraction of the funding sought. With the docket increasing at a prodigious rate and election cases from HUD on the rise, it may not be realistic to expect Justice to intervene in a significant number of additional complex cases referred by private organizations.

At a minimum, however, the Department should devise a tracking system for private referrals so that private parties and organizations can quickly and easily find out about the status of their referrals. DOJ maintains exactly such a tracking system for the land-use and zoning cases HUD refers to it pursuant to Section 3610(g)(2)(C) of the new Act. Since the new Act became effective, Justice has received forty-eight land-use or zoning referrals, and has conscientiously provided the Office of General Counsel with regular reports on the status of each of these cases. Implementing a similar system for private referrals should not be burdensome and would encourage private organizations to work more closely with the Department.

D. APPROACH TOWARD DISCRIMINATORY EFFECT THEORY

Consistent with the Reagan Administration's general hostility toward disparate impact theory, the Civil Rights Division took the position during the Reagan years that it would not rely on evidence of discriminatory effect in Title VIII cases. That policy resulted in the filing of a brief by the Department with the U.S. Supreme Court in June of 1988 asking the Court to review the question of whether disparate impact theory could be relied on in a fair housing case.[97] The Department's request was denied, and the Court has to date still not addressed the issue.

Although the resolution of this issue has enormous ramifications for Title VIII enforcement, two years into the Bush Administration it is still not clear what position the Bush Justice Department will take toward the application of disparate impact theory in Title VIII cases. The Assistant Attorney General for Civil Rights, John R. Dunne, has stated publicly to private fair housing advocates that the Department is currently reviewing the question.

With the disparate impact issue officially under review, the Housing and Civil Enforcement Section has, for the most part, successfully managed to dodge the question. The Department has yet to bring a suit that would require tackling the problem head-on. One recent case, however, suggests that the Housing and Civil Enforcement section may be moving slowly toward acceptance of an effects test.

In *United States v. Schuylkill Township*,[98] the Department brought suit to challenge a zoning ordinance that it argued had been amended in a manner that discriminated on the basis of handicap in violation of Title VIII. On cross motions for summary judgment, DOJ argued that handicapped persons were the only group disadvantaged by the ordinance's definition of "family." The court ruled, based on this argument, that although the zoning law as amended had not been enacted with an intent to discriminate, it clearly had a discriminatory effect on mentally handicapped persons. Accordingly, the court found that the zoning law violated Title VIII despite DOJ's failure to establish discriminatory intent.

Whether the Department was desirous of winning a decision on these grounds is unclear. One can hardly laud the Department for failing to appeal a case that it has won, but it remains noteworthy that Justice has apparently decided not to take issue with the court's ruling.

It is also noteworthy that DOJ has taken the position in other systemic cases — not necessarily involving disparate impact theory — that the definition of "pattern or practice" will be satisfied by the existence of "more than one isolated instance of discrimination."[99] This is a significant development that frees Justice to invoke its Section 3614 jurisdiction to initiate pattern or practice suits in a wide range of factual situations.

E. RACE-CONSCIOUS PROGRAMS DESIGNED TO FOSTER INTEGRATION

The Reagan Administration's well-publicized hostility toward race-conscious programs designed to maintain or foster integrated housing has been thoroughly discussed elsewhere and need not be repeated here.[100] Whether the Bush Housing and Civil Enforcement Section will adopt the Reagan policy on race-conscious integration programs is unclear. As with the Department's approach to disparate impact theory, fair housing advocates are still waiting for the other shoe to drop.

The answer may be some time in coming. Two of the three major cases brought by the Reagan Justice Department to challenge the use of race-conscious programs, *United States v. Charlottesville Redevelopment & Housing Authority*[101] and *United States v. Starrett City Associates*,[102] have run their course in the courts and will not require further prosecution by the current Administration. The only remaining case, *United States v. Atrium Village Assoc.*,[103] was recently settled.

The *Atrium Village* settlement, however, requires brief mention, for the terms reflect the Bush Housing Section's sensitivity to the controversy raised by the Reagan Administration's opposition to race-conscious integration programs.

In 1987 DOJ filed suit against Atrium Village, a Chicago housing development, alleging that the development's use of racial quotas to maintain an integrated project violated Title VIII. The Village did not deny that it used race as a factor to select tenants after the project opened in 1978, but contended that racial quotas were no longer in use because the racial composition of the tenants had stabilized.

In February of 1990 the Justice Department entered into a settlement with Atrium Village that was identical in all respects to a settlement proposal offered to the Justice Department by Atrium Village attorneys before the suit was filed. The settlement requires the Village, which no longer relies on racial quotas, to adhere to a racially neutral tenant selection policy. If the Village wishes to change the policy, it must apply to the Justice Department for approval. If the proposed change cannot be worked out to the satisfaction of the parties, the settlement preserves the Department's right to challenge the Village's proposed tenant selection procedure in federal court.

In effect, the settlement merely leaves for another day the controversial question of whether race-conscious programs designed to foster integration in housing are consistent with the intent and purpose of Title VIII. The agreement effectively allows a difficult political issue to be placed on the back burner for the indefinite future.

While the settlement surely represents anything but an outright repudiation of the prior administration's policy on race-conscious programs, the Department should be credited, at a minimum, with recognizing the folly of wasting additional resources pursuing the Atrium Village litigation.

F. CRIMINAL CASES

To date the Bush Justice Department has aggressively prosecuted cases involving criminal violations of the Fair Housing Amendments Act. Twenty-nine new criminal cases were filed in 1989 alone alleging interference with individuals' rights under the Fair Housing Act. Of the twenty-two cases that were resolved during 1989, all resulted in convictions. Defendants received prison sentences ranging from six months to five years.[104]

In April of 1990 the Justice Department urged Congress to increase the penalty for certain types of interference with rights protected under the new Fair Housing Act. Under the Department's proposal, interference or intimidation involving the use of fire or firearms would constitute a felony if it caused more than $100 in property damage. The maximum penalty would rise from a $1,000 fine and one year in prison, to a $250,000 fine and five years in prison. At present, interference and intimidation resulting only in property damage are misdemeanors.[105]

IV. Conclusion and Recommendations

The first two years of the Bush Administration have witnessed a renewed commitment to fair housing enforcement. It is clear that this Administration, at least with respect to issues of fair housing, has determined to part company with Reagan policies. Initial indications suggest that both the Department of Justice and HUD intend to take their responsibilities under the Fair Housing Amendments Act seriously.

While concrete steps have been taken in the right direction in a number of areas, and while there are encouraging signs in a number of other areas, much remains to be done. Troubling issues sit unresolved, and it is these issues, ultimately, upon which a final assessment of the Bush Administration's housing enforcement efforts will rest.

If federal fair housing enforcement is to be both effective and successful, additional steps need to be taken promptly at the highest levels of the Justice Department and at HUD. The most important of these steps include the following:

(1) HUD should move quickly to identify the areas of the investigative and reasonable cause process where delays are occurring, and channel additional resources to eliminate the growing backlog of unprocessed complaints. At the same time, HUD should redouble its education and outreach efforts to ensure that potential victims are aware of the new protections and remedies afforded by the Fair Housing Amendments Act, and know how and where to file a complaint.

(2) HUD must renew its efforts to encourage state and local governments to seek certification as substantial equivalents. HUD should provide basic guidance to states and localities so that they will know precisely what provisions to include in their local laws to win certification.

(3) HUD should instruct its staff to push for higher monetary settlements in their conciliations, and should continue to press administrative law judges to follow Judge Heifetz's example and order larger compensatory damage awards and civil penalties. It is the size of the award, more than any other factor, that will ultimately work to deter future wrongdoing.

(4) HUD should move promptly to invoke its power to self-initiate cases in areas that are under- litigated, such as discriminatory advertising and lending.

(5) Although HUD has completed the collection of data about its own complaints and program applicants and beneficiaries, HUD should now place a priority on completing the type of national study contemplated in Section 808(e)(1) of the Fair Housing Amendments Act.

(6) The Administration should place a priority on winning Congressional authorization for a significant increase in DOJ's Housing Section staff. Continued expansion of the Department's housing case load cannot be accommodated by the current staff and the resources available to them.

(7) The Department of Justice should place a priority on identifying, investigating, and intervening in new and complex cases raising "cutting edge" issues that have been referred by private fair housing organizations. Although Justice must be credited for the aggressive expansion of its docket to date, given the increase in the number of "garden variety" cases it must be careful not to lose sight of the more complex pattern and practice cases that have traditionally been its trademark. Discriminatory advertising, complex race-based class actions, and mortgage and insurance redlining are but a few of the areas where the Department must begin to reassert its leadership role.

(8) The Department of Justice must devise a tracking system so that private parties and fair housing organizations can be kept apprised of where referral cases are at any given time in the DOJ review process.

(9) The Department of Justice should directly address the question of disparate impact theory and its applicability to Title VIII, and expressly rescind the Reagan administration's policy of refusing to file cases based on evidence of discriminatory effect.

(10) The Department of Justice should continue to push for higher settlement awards, and follow the example it has

set in *Southern Management* by taking more cases to trial. Although it has improved on this point, the Department still has a tendency to overvalue settlement as a means of resolving litigation.

(11) HUD and the Department of Justice should make every effort to ensure the prompt passage of legislation currently pending before Congress that would authorize DOJ to contract with private fair housing organizations to conduct fair housing testing in DOJ cases.

(12) HUD and the Department of Justice should work together to locate and identify complainants or potential complainants in need of prompt judicial action, and should make every effort to see that those cases are filed and prosecuted in a timely manner.

Chapter XIV

Federal Enforcement of the Fair Lending, Equal Credit Opportunity, and Community Reinvestment Laws: 1989–1990

by Stephen M. Dane

I. Introduction

In its report *One Nation, Indivisible*, the Citizens' Commission on Civil Rights made a number of recommendations to improve the federal government's statutory, regulatory, and enforcement efforts to eliminate discriminatory lending practices.[1]

The first and principal recommendation was for Congress to simplify the statutory maze that currently exists with respect to discrimination in the financing of housing by amalgamating into one statute all of the best features of the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Community Reinvestment Act, the financing section of the Fair Housing Act, and related provisions from other laws and executive orders. As part of this idea the Commission proposed that all regulatory and enforcement authority be placed in one federal agency, preferably the Department of Housing and Urban Development.

Acknowledging that statutory simplification is perceived as a radical proposal, the Commission offered some alternative suggestions to address the mortgage lending discrimination crisis. They included both expending statutory coverage and improving enforcement.

A. THE EXPANSION OF STATUTORY COVERAGES

The Commission suggested that the Fair Housing Act (Title VIII) be amended to make clear that discriminatory marketing efforts of a lender are violations of the Act, and to clarify that discriminatory practices by private mortgage and homeowners insurers are intended to be prohibited by the Act.

The Commission recommended that the Home Mortgage Disclosure Act (HMDA) be amended to include non-depository institutions (such as mortgage companies not affiliated with savings and loans or banks), and that HMDA be expanded to require covered lenders to collect and report applications data.

The Commission proposed that the Community Reinvestment Act (CRA) be expanded to apply to non-depository institutions (such as mortgage companies), and that additional CRA enforcement mechanisms be made available to community interest groups and private citizens. The Commission also suggested that the CRA be amended to prohibit any residential mortgage loan underwriting policy, pricing policy, or product that has a disparate impact on low income applicants.

B. THE REFINEMENT OF ENFORCEMENT AUTHORITY AND THE IMPROVEMENT OF REGULATIONS

Focusing on the institutional constraints imposed upon the Department of Justice (DOJ), the Commission recommended that the Department be permitted to increase the amount of staff dedicated to equal credit issues, and that a separate credit sub-section of the Housing and Civil Enforcement Section handle only credit-related matters. The Commission also proposed that the Department actively use the investigative tools used by private fair lending advocates to identify lending discrimination, including the collection and analysis of lending data and the use of testing.

The Department of Housing and Urban Development (HUD) was encouraged by the Commission to increase its enforcement efforts in the area of residential finance discrimination, and to draw upon and improve regulations promulgated by the federal financial supervisory agencies under the authority of Title VIII, ECOA, HMDA, and CRA.

The Commission's Report contained a number of recommendations to prompt the federal financial supervisory agencies — the Comptroller of the Currency, the Office of Thrift Supervision (formerly the Federal Home Loan Bank Board), the Federal Deposit Insurance Corporation, and the Federal Reserve Board — to improve their enforcement performance, including:

—updating regulations;

—revising and improving the CRA ratings system;

—improving the CRA examination process;
—improving the CRA protest procedures;
—using "testers" to monitor compliance with all applicable laws;
—improving data collection and data analysis procedures;
—establishing advisory boards similar to the Citizens Advisory Council used by the Federal Reserve Board.

II. Federal Enforcement Efforts: 1989-1990

When it issued its Report in 1989 the Citizens' Commission identified evidence indicating that discrimination in residential financing transactions remains a serious problem in this country.[2] New reports and studies confirming the existence of serious inequities in conventional residential financing based on race and location continue to be published.[3] During the past year Congress, the Department of Justice, and HUD have begun to respond vigorously to the issue. The federal financial supervisory agencies have responded as well, but only cautiously and then only in response to pressure received from Congress.

A. LEGISLATIVE AND CONGRESSIONAL INITIATIVES

The passage in 1989 of the Financial Institutions Reform, Recovery, and Enforcement Act (FIRREA) had a profound impact not only on the overall regulation of the savings and loan industry, but also on the statutory and regulatory provisions relating to mortgage lending discrimination enforcement. The primary purposes of FIRREA were to provide the funding necessary to "bail out" failed thrifts and to impose strict regulations and penalties to prevent the crisis that visited the savings and loan industry during the 1980s. As part of the legislative process a number of provisions were added to the final bill that should help to identify and eliminate mortgage lending discrimination.

First, §1211 of FIRREA amended the Home Mortgage Disclosure Act by, among other things, including non-depository institutions within the scope of its coverage and by requiring lenders to compile and report applications data.[4] These were improvements recommended by the Citizens' Commission in its Report. Section 1211 also expanded the reporting requirements for purchased loans (as distinguished from originated loans), and required the Federal Reserve Board, in cooperation with other appropriate regulators, to develop new regulations prescribing the format and procedures for disclosing data to the public.

Second, §1212 of FIRREA amended the Community Reinvestment Act by requiring certain portions of CRA evaluations to be made public.[5] The public disclosure of CRA ratings was one of the suggestions made by the Citizens' Commission in *One Nation, Indivisible*.

Third, §1220 of FIRREA required each of the federal financial regulatory agencies and HUD to submit reports on the extent of discriminatory lending practices and to make recommendations for appropriate measures to assure non-discriminatory lending practices.[6] This provision had the potential for augmenting the wealth of data published by the private sector indicating the scope and extent of mortgage lending discrimination among regulated institutions.

In addition to FIRREA, Congress has increased its attention to residential mortgage lending discrimination issues. October 24, 1989, the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs conducted hearings on discrimination in home mortgage lending. At those hearings the subcommittee called on HUD and the financial regulatory agencies to submit their reports as required by §1220 of FIRREA, and requested the input of civil rights advocates on the issue. December 19, 1989 the Subcommittee on General Oversight and Investigations of the House Committee on Banking, Finance and Urban Affairs conducted a field hearing in Jamaica, New York on discriminatory lending practices. May 16, 1990, the Subcommittee on Consumer and Regulatory Affairs of the Senate Banking Committee conducted a follow-up hearing on mortgage lending discrimination issues, again seeking input from HUD, the financial regulatory agencies, and civil rights advocates.

A new bill proposed in the Senate by Senator Alan J. Dixon would amend the Equal Credit Opportunity Act to require mortgage lenders to furnish to applicants a copy of any appraisal used in connection with an application for a loan that is or will be secured by a lien on residential real property. The bill calls upon each appropriate federal banking agency to establish "consumer divisions." These departments are to conduct separate consumer examinations to determine the extent to which lenders are in compliance with all applicable laws and regulations relating to consumer protection and community reinvestment laws. The bill would also amend HMDA by eliminating any total asset exemption for non-depository institutions, and requiring financial regulatory agencies to refer pattern-and-practice cases under the Equal Credit Opportunity Act to the Justice Department. The bill failed to clear a House-Senate conference committee before the 1990 legislative session ended, but is expected to be introduced again in 1991.

Another bill, the Department of Justice Fair Housing Testing Act of 1989 (S 1810), would establish a pilot testing program for use by the Department of Justice. The bill provides funding for DOJ to conduct its own fair housing tests, including tests of lending discrimination, or to outsource such tests. The bill is currently pending before the Senate Judiciary Committee.

B. DEPARTMENT OF JUSTICE

Since the appointment in the summer of 1988 of Paul Hancock as the new Chief of the Housing and Civil Enforcement Section of the Department's Civil Rights Division, DOJ's enforcement efforts in the credit discrimination area have increased significantly, and the sophistication of the department's staff in mortgage lending discrimination matters has become apparent. In 1989 the Department filed two suits alleging violations of the Equal Credit Opportunity Act,[7] and filed an amicus brief in favor of the plaintiff's position in a challenge under the Fair Housing Act to alleged discrimination by a private mortgage insurer.[8] This is the first amicus brief the Department has filed in a private credit discrimination case since December, 1980.[9] In 1990 the Department filed another ECOA suit and two amicus briefs in private lawsuits involving claims of discrimination by homeowners insurers.[10]

The Department has also substantially increased its connections with fair housing advocates involved in mortgage lending discrimination issues, and has provided training and technical assistance to them upon request. It has begun to meet with HUD and the federal financial regulatory agencies to discuss mortgage lending discrimination issues.

The Department has decided to utilize sophisticated statistical analysis of mortgage lending data, a significant change from its earlier position.[11] It has hired its own statistician to assist in this effort. The Housing and Civil Enforcement Section has informally assigned certain of its lawyers to focus specifically on equal credit problems, thus taking advantage of some degree of specialization and efficiency. These improvements are consistent with recommendations made by the Citizens' Commission in its earlier Report.[12]

The clearest example of the Department's commitment to tackling the mortgage lending discrimination problem is its initiation of a broad investigation into allegations of discrimination by mortgage lenders in Atlanta, Georgia. Prompted by the *Atlanta Journal-Constitution's* investigative series, "The Color of Money," which found large disparities in the amount of mortgage loans granted to similarly situated white and minority neighborhoods in the Atlanta metropolitan area, the Department collected statistical data and other information from all 64 banks and savings and loan associations in the area. Probably the largest investigation the Department has ever made of the lending industry, it has necessarily required the investment of an enormous amount of time, energy, and staff. Regardless of the results of the investigation, which is still pending, the Department has made clear to the civil rights and lending communities that it is serious about ferreting out any vestige of mortgage lending discrimination and will spare no effort to do so.

Although its interest and focus has improved dramatically in the last two years, the Department remains hampered by many of the same obstacles identified by the Citizens' Commission in its initial report.[13] It has received only one referral of alleged credit discrimination from the other federal agencies charged with equal credit enforcement authority. Although the Housing and Civil Enforcement section has been able to increase its staff slightly, it still needs a substantial increase in personnel in order to investigate adequately all equal credit allegations in a timely manner. Because these are matters that are beyond the ability of the Department itself to control, Congress must take the steps necessary to effect such improvements.

C. HUD ENFORCEMENT EFFORTS

Before the Fair Housing Amendments Act of 1988 the Department of Housing and Urban Development had little meaningful authority to address allegations of mortgage lending discrimination. HUD had never been a significant player in the enforcement of equal lending and community reinvestment laws, even Title VIII.[14]

Since the implementation of the Act, however, HUD has demonstrated a strong interest in residential mortgage lending discrimination issues. For example, it has publicly admitted its prior failure to meet its responsibility under HMDA to disclose FHA lending data, and has renewed its efforts to fulfill that responsibility.[15] HUD's Office of Fair Housing and Equal Opportunity has heavily emphasized mortgage lending discrimination issues in at least some of its Fair Housing Assistance Program (FHAP) training conferences.[16] Under its Fair Housing Initiatives Program (FHIP), HUD has provided direct funding to private fair housing groups for the purpose of conducting mortgage lending investigations and testing.[17] It has begun to work with the federal financial regulatory agencies and the Federal Financial Institutions Examination Council (FFIEC). It has initiated internal improvements that will focus on the mortgage lending discrimination problem, which previously had received little, if any, attention.[18]

HUD's professed dedication to the mortgage lending problem is encouraging, but it could do much more. Those regulations it promulgated under the Fair Housing Amendments Act of 1988 that relate specifically to discriminatory financing transactions are not helpful.[19] HUD could have made a significant contribution to the interpretation of Title VIII's prohibition against discrimination of the financing of housing if these regulations had been more comprehensive and detailed.[20] In the regulations HUD has at least now acknowledged that discriminatory insurance practices are prohibited by Title VIII,[21] but both lenders and fair housing advocates need more specific guidance from it with respect to what types of activities it considers to be violative of the Act.[22]

HUD needs to organize and train a special systemic unit with jurisdiction nationally to focus exclusively on mortgage lending related charges of discrimination. The identification of individual instances of mortgage lending discrimination is difficult even by those with substantial experience in the field. Indeed, the federal financial regulatory agencies have been unable to identify it for years, despite the substantial statistical evidence suggesting its presence. A lending discrimination "S.W.A.T. team" should possess the necessary financial and analytical expertise on mortgage lending discrimination issues that the normal HUD investigator may lack.[23]

HUD could also contribute significantly to the elimination of mortgage lending discrimination by contracting with private fair lending advocates to perform activities that HUD itself may not be able to do. For example, testing has been an extremely effective investigative tool for private fair housing organizations throughout the country, yet it is often impracticable for HUD employees to do so. HUD could develop a major mortgage lending testing initiative by contracting with local fair housing organizations and public agencies to test for discrimination in this field.[24] This and other enforcement tools (e.g., training, the publication of brochures and handbooks) can perhaps be performed more efficiently if HUD sub-contracts for such work.

D. FINANCIAL REGULATORY AGENCIES

The federal financial supervisory agencies — the Comptroller of the Currency, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the Federal Reserve Board — have also made attempts to modify their enforcement of the equal credit and community reinvestment laws. In contrast to the Department of Justice and HUD, however, the agencies' efforts have largely been forced in response to FIRREA and intense congressional scrutiny.

1. FIRREA SECTION 1220 REPORTS

Section 1220 of FIRREA compelled the financial regulatory agencies to report their findings on the extent of discriminatory lending practices by lenders subject to their regulation and to make recommendations for appropriate measures to assure nondiscriminatory lending practices. In October, 1989 the agencies submitted those reports to the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs.[25]

The reports were, for the most part, cursory and uninformative. Very little statistical data was presented, and few recommendations were made. None of the agencies took a position on whether any mortgage lending discrimination problem exists. As they have in the past,[26] the agencies claimed to have no evidence of "intentional" lending discrimination activity. They claimed not to have sufficient data of their own on which to draw any conclusions or make any recommendations,[27] and generally ignored the many private studies conducted using publicly available data.[28]

2. HMDA DATA DISCLOSURE

Section 1211 of FIRREA commanded the Federal Reserve Board, in cooperation with other appropriate regulators, to develop regulations prescribing the format and procedures for disclosing HMDA data to the public. The Fed did so in December 1989.[29] Those regulations, however, excluded all but a small percentage of mortgage companies from having to report their mortgage loan HMDA data. Although claiming to be merely interpreting statutory language concerning exemptions from coverage, civil rights advocates charged that the regulations were overly restrictive and inconsistent with the purpose of FIRREA.[30] Moreover, the regulatory agencies initially stated their intent not to make any information contained on lenders' Loan Application Registers available to the public. They backed off from that stand only in the face of pressure from community groups and Congress. Even so, the regulators continue to refuse to release certain information contained in the registers that is critical to the detection of mortgage lending discrimination.[31] The agencies' data disclosure policies thus suggest a constrained, rather than a vigorous, philosophy toward the identification and elimination of mortgage lending discrimination practices.

3. OTHER ENFORCEMENT EFFORTS

In March 1989 all four agencies issued a joint CRA Policy Statement explaining how the CRA performance of depository institutions would be analyzed in the future. The Statement came on the heels of intense congressional scrutiny of the agencies' CRA enforcement efforts.[32]

The Statement shows promise in a number of respects. It requires regulated financial institutions to have met their CRA obligations before submitting applications for regulatory approval. In the past lenders with a poor CRA record were nevertheless permitted to proceed with plans requiring agency approval on the condition that they take steps in the future to improve their CRA performance. It expands what kind of information must be contained in a lender's CRA statement, and suggests that lenders must be able to document their CRA performance in order to receive favorable determinations from the agencies. Unfortunately the Policy Statement did not improve the CRA protest procedure, and what modifications were made to the process tended to more restrictive of the ability for community groups to provide input.[33]

The agencies have identified a number of new initiatives that they intend to implement as a consequence of FIRREA. For example, the Office of Thrift Supervision has refined its examination system by establishing a specialized compliance examination program focusing specifically on consumer protection and public interest laws and regulations, including those related to fair lending. The FDIC has also established a new consumer compliance examination program with specialized consumer compliance examiners who have career paths distinct from safety and soundness examiners. These modifications to the examinations process are consistent with the Citizens' Commission recommendations.[34] Assuming that the examiners involved in the program have the expertise and training to identify discriminatory mortgage lending behavior, this should improve these agencies' attention to civil rights compliance and bring some balance to their traditional overemphasis on safety and soundness concerns.

For the first time the OTS has actually used the voluminous data it has collected over the past decade by examining it in selected metropolitan areas and conducting special nondiscrimination examinations of those regulated institutions whose statistics manifested unusually large differences between rejection rates for black and white applicants.[35] This is a positive improvement from the former Federal Home Loan Bank Board's practice of collecting the data but then ignoring it. The OTS has also identified certain underwriting and pricing practices that it believes could, in certain circumstances, produce discriminatory effects. It would be helpful if the OTS added these observations to its nondiscrimination regulations.[37]

The FFIEC Consumer Compliance Task Force, in which all of the financial supervisory agencies participate, is studying four projects ostensibly designed to enhance enforcement of the fair lending and community reinvestment laws. Proposals to (1) produce an executive summary of HMDA data comparing each individual financial institution's loan distribution to that of its peers in the communities in which it does business,[38] (2) share among the agencies information obtained from community and consumer groups by agency examiners, (3) develop an informational pamphlet for financial institutions and consumers, and (4) encourage participation in mortgage review boards[39] are all under consideration by the Task Force. Unfortunately, the FFIEC Task Force also considered, but rejected, a proposal to conduct pre-application testing.[40] This is unfortunate since testing has long been recognized as one of the most effective tools for identifying fair housing violations.[41]

Most of the agencies have also increased their emphasis in training on lending and consumer compliance issues. Although this is promising since it suggests a renewed interest in the area, only time will tell whether the interest will remain high and whether the training will have any effect on agency enforcement of the equal credit and community reinvestment laws.[42]

Many of the Citizens' Commission suggestions for improvement in the regulatory performance of the financial supervisory agencies have been implemented, at least to some degree. For example, regulations relating to CRA and HMDA have been modified and updated, the CRA ratings system has been revised to some extent,[43] and data collection and review procedures have been modified.[44] But these reforms were essentially mandated by FIRREA, and cannot be said to have been self-initiated by the agencies.[45] The agencies have not taken other steps that were suggested by the Citizens' Commission in its initial Report and which could promote the elimination of whatever mortgage lending discrimination problems still exist. For example, it has already been noted that the agencies have apparently rejected the use of testers to monitor compliance with the fair lending laws. The Federal Reserve Board continues to be the only federal financial supervisory agency that utilizes a citizens advisory board. The CRA protest procedures need to be reexamined and expanded, not constricted. Other suggestions made by the Commission in its initial report are still valid and should be implemented.[46]

III. Recommendations

As noted throughout the preceding discussion, many of the original recommendations made by the Citizens' Commission to improve the federal government's enforcement of the fair lending, equal credit opportunity, and community reinvestment laws have been implemented in one form or another. The enactment of certain provisions of FIRREA, the Department of Justice's use of statistical analytical tools and its informal division of labor on mortgage credit issues, and the federal financial agencies' proposed modifications to their examination and data collection processes implemented many of the recommendations made by the Citizens' Commission in its earlier report. Only the passage of time will reveal whether these improvements are going to have any impact on the equitable distribution of conventional mortgage credit throughout the country, particularly in large metropolitan areas.

A number of the Commission's original recommendations have not yet been adopted, however, and still remain viable. They are set forth below:

1. SIMPLIFICATION OF THE STATUTORY FRAMEWORK AND PLACEMENT OF ENFORCEMENT AUTHORITY IN ONE FEDERAL AGENCY

The statutory scheme assembled by Congress over the past 20 years remains extremely confusing and needs simplification. The Commission reiterates its suggestion that Congress enact legislation that amalgamates into one statute relating solely to discrimination in the financing of housing all of the best features of the Equal Credit Opportunity Act, the Home Mortgage Disclosure Act, the Community Reinvestment Act, the financing section of Fair Housing Act, and related provisions from other laws and executive orders. The Commission also reiterates its initial suggestion that regulatory and enforcement authority be placed in one federal agency (in addition to the Department of Justice), preferably the Department of Housing and Urban Development.

2. STATUTORY EXPANSION

The Fair Housing Act should be amended to clarify to what extent lenders have an affirmative obligation to market their residential real estate related products to minorities and minority neighborhoods, and to clarify the extent to which discriminatory practices of private mortgage and homeowners insurers are within the scope of the Act. Without further guidance from Congress on these issues, litigation will be necessary and the courts will have to struggle with difficult issues of statutory interpretation. It would be much more efficient for Congress to address these issues right up front.

The CRA protest procedure must be codified. The regulatory agencies, who adopted the procedure, have narrowed rather than expanded the availability of its use by fair lending advocates and community interest groups. In the absence of a commitment from those agencies to view the CRA protest mechanism as an effective enforcement tool, Congress must take the incentive to do so.

3. REGULATORS AND REGULATIONS

Now that the Department of Justice has shown renewed interest in mortgage lending discrimination issues, all of the tools necessary for it to do its job must be made available. It must be given adequate subpoena power under Title VIII and ECOA, and its budget must be increased so that it may hire a sufficient number of staff to handle difficult and time-consuming mortgage lending discrimination cases.

New improved regulations, preferably adopted by the Department of Housing and Urban Development, need to be promulgated on lending issues. The regulations that currently exist are either too vague, too general, or too outdated to be of much use to either lenders or civil rights advocates.

HUD should also establish a special systemic unit that would have nationwide jurisdiction and would devote itself exclusively to mortgage lending discrimination issues. Although not originally recommended by the Citizens' Commission, it is consistent with the Commission's recommendation for the internal handling of mortgage lending issues by the Department of Justice and HUD and has been suggested by other civil rights groups.[47]

The federal financial supervisory agencies must revisit the consideration of the use of testers and the expansion of the CRA protest mechanism. Both of these tools can improve the agencies' performance in fulfilling their statutory obligation to enforce the equal credit and community reinvestment laws. The agencies must also seriously consider following the example of the Federal Reserve Board in establishing and relying upon citizens advisory boards.

Chapter XV

The New Legal Regime: Affirmative Action After *Croson* and *Metro*

by Michael C. Small

I. Introduction

Affirmative action continues to be a divisive social and political issue in our nation.[1] This is really nothing new though; it has been this way ever since the issue surfaced nearly two decades ago. Recently, the debate has intensified.

For one, renewed attention to the continued plight of the disproportionately black underclass has provoked questions on the utility of affirmative action: Is affirmative action making any in-roads towards reversing the cycle of poverty and alienation in which so many are mired?[2] How does it begin to deal with the alarming fact that 1 in 4 black males are caught up in our criminal justice system? Within the minority community itself, the debate has been vociferous. Shelby Steele is now a celebrity, and regularly turns up on talk shows challenging the prevailing left-liberal wisdom on affirmative action.[3] And the concept of schools for "blacks only" is derided by some as race-consciousness gone mad.[4]

The Bush Administration has fueled the fires of the debate — some would say disengeously or even shamelessly. First, there was the highly publicized veto of the 1990 Civil Rights Act — which the President labeled a "quota bill" and claimed would lead to rampant affirmative action in the workplace. Then came the flap over minority targeted scholarships in universities receiving federal funds. Already, pundits are calling affirmative action the "Willie Horton" of the 1992 elections, where candidates will shout "quota," and play racial politics in search of white votes.

This paper is not about these political questions. It is about the legal regime of affirmative action, which has recently undergone fundamental changes: In each of the past two terms, the Supreme Court has added its voice to the cacaphony of debate, and issued landmark decisions that have clarified the constitutional ground rules of affirmative action — *City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989), and *Metro Broadcasting, Inc. v. FCC*, 110 S. Ct. 2997 (1990). Those cases are the focus of this paper. In reviewing the cases, I do not intend to engage in polemics. Nevertheless, it is impossible to divorce constitutional law from politics. Indeed, it is politics that has shaped the way that the Court clarified the rules of affirmative action in *Croson* and *Metro*. The Reagan era has left its indelible mark on the law of affirmative action.[5]

The first case, *Croson*, did not overturn previous rulings that, in certain circumstances, it is constitutional to use race-conscious measures as a remedy for past discrimination against minorities. But in *Croson*, an increasingly conservative Court —which had clearly become more hostile to affirmative action[6] — severely limited those circumstances, at least for state and local governments. Applying new constitutional ground rules, the Court struck down (by a 6-3 vote) a municipal affirmative action program that, like nearly 200 other programs of its kind throughout the country, gave public contracting preferences to minority-owned businesses. The impact of the *Croson* decision has been enormous, and its effects extend well beyond the context of public contracting to a host of affirmative action programs on the state and local level, from preferential hiring in police departments to preferential admissions in colleges.

In the second case, *Metro*, the Court addressed the constitutionality of affirmative action programs mandated by Congress. Finding the *Croson* ground rules inapplicable to such programs, the Court held that Congress has much more leeway to act on the basis of race to benefit minorities than do state and local governments. Applying these different rules, the Court upheld (in a 5-4 decision) two federal policies, adopted by the FCC and specifically authorized by Congress, that give preferences to minorities in the allocation of radio and television licenses. The result in *Metro* was perhaps the most surprising of the Court's 1989-90 Term. But the lasting significance of the decision remains to be seen. For one, the FCC policies — at least as they were characterized by the FCC itself — are not intended to remedy discrimination, but rather, are designed to promote a non-remedial objective: increasing the diversity of viewpoints in broadcasting. Thus, the exact standards that the Court will apply to a *federal remedial program* — some of which are already under attack in the lower courts — are somewhat uncertain. Second, the Court's approval of a federal non-remedial program in *Metro* does not necessarily mean that state and local governments can use race for non-remedial goals as well, for example, in promoting diversity among the student body in universities. Third, and most importantly, *Metro* was Justice Brennan's last majority opinion. Although David Souter intimated in his confirmation hearings that he would have agreed with Justice Brennan in *Metro*, no one knows how Justice Souter will rule on these issues.

This paper provides an overview of the ground rules for affirmative action after *Croson* and *Metro*. It begins with a discussion of the affirmative action programs at issue in both cases. It next moves to an analysis of standards of constitutional review that the Court deemed applicable to state and local affirmative action plans in *Croson*, and to congressional plans in *Metro*. The paper then describes the ramifications of the diverging standards of constitutional review. It does so, first, by discussing what sort of "governmental interests" — the permissible ends of affirmative action — can justify the use of racial classifications. Here, the paper shows that the federal government may act on the basis of race to remedy the effects of broad societal discrimination, and may even use race for non-remedial objectives, such as promoting racial and ethnic diversity in certain sectors and industries. By contrast, state and local governments probably can act on that basis only to remedy specifically identifiable discrimination in their jurisdictions. After dealing with the ends, the paper moves to the means — or what is known in the constitutional parlance as the "tailoring" of legislation. Here, the paper shows that the various factors that the Court considers in determining if an affirmative action plan is properly tailored — such as impact on nonminorities and whether the program is a "flexible goal" or "rigid quota" — are actually applied across the board to both state and federal programs.

The paper closes by discussing the impact of *Croson* and *Metro* on court-ordered affirmative action plans, and on the statutory — Title VII and Section 1981 — limits on the plans of private employers. Neither type of plan was at issue in *Croson* and *Metro*. But both cases may affect the extent to which courts and private employers can engage in affirmative action.[7]

II. The Programs at Issue in *Croson* and *Metro*

A. THE RICHMOND MBE PLAN

The Richmond City Council enacted the Minority Business Utilization Plan ("the Plan") at issue in *Croson* on April 11, 1983. Designed to last five years, the Plan required prime contractors to whom the City awarded construction contracts to subcontract at least 30% of the dollar amount of the prime contract to one or more MBE's. The Plan defined "MBE" as a business at least 51% of which was owned and controlled by minority group members. *Croson*, 109 S. Ct. at 713. In turn, "minority group members" was defined as "[c]itizens of the United States who are Blacks, Spanish-speaking, Orientals, Indians, Eskimos or Aleuts." *Id.* The Plan included a waiver provision lifting the set-aside requirement where, after making every feasible attempt to comply, the prime contractor demonstrated that it was unable to meet the 30% figure because sufficient, qualified MBE's were either unavailable or unwilling to participate in the contract. *Id.*

Before enacting the Plan, the City Council reviewed a study that indicated that although the population of Richmond was 50% black, only .067% of the City's prime construction contracts had been awarded to minority businesses during the period 1978-83. The City Council also heard evidence that the major construction trade associations in Richmond — to which many of the City's prime contractors belonged — had virtually no minority members. In addition, one councilperson, a former mayor of Richmond, testified "without equivocation" that the local construction industry "is one in which race discrimination and exclusion on the basis of race is widespread." *Id.* at 714. Finally, the City Council relied on the findings of nationwide discrimination in the construction industry on which Congress had predicated a similar MBE program in the Public Works Employment Act of 1977, a program that the Supreme Court upheld in *Fullilove v. Klutznick*, 448 U.S. 448 (1980).

The J.A. Croson Company, a non-MBE firm, bid on a city construction project. Croson sought a waiver of the subcontracting requirement, alleging that no MBE's were available. The City denied Croson's waiver application and rebid the project. Croson then sued the City, claiming that the MBE plan violated the Constitution.[8] The Reagan Justice Department filed a brief in support of Croson, which came as no surprise: The Administration had previously urged the Court to strike down other affirmative action programs, and had done so in a very high profile manner.[9] For example, in *Sheet Metal Workers v. EEOC*, 47 U.S. 421 (1986), the Solicitor General contended that race, conscious action could only benefit specific "victims" of discrimination. That principle — which the Court rejected — would have gutted the essence of affirmative action, which is intended to benefit individuals through their membership in groups, even if the individuals themselves have not been disadvantaged.

B. THE FCC PREFERENCES

Metro involved two FCC programs that award preferences to minority businesses in the allocation of broadcast licenses. Under the first program, the FCC considers minority ownership as one factor in the agency's "comparative proceedings" between applicants for new licenses. Through its second program, the "distress sale" policy, the FCC allows a broadcaster whose license has been designated for a revocation hearing, or whose renewal application has been designated for a hearing, to assign the license to a minority enterprise at a "distressed" price.[10] As with the Richmond MBE program, the FCC programs define minority to include blacks, Hispanics, Eskimos, Aleuts, American Indians, and Asians.

The FCC adopted both the comparative hearing preference and the distress sale policy in 1978.[11] At that time, minorities owned less than 1% of the nation's radio and television stations, even though they constituted about 20% of the nation's population. In the FCC's view, this underrepresentation of minorities among the ranks of owners of broadcast licenses affected what was actually being conveyed over the nation's airwaves.[12] This view was the logical corollary of two guiding assumptions of the FCC: First, that there is a relationship between ownership of a radio or television station, and the nature of programming and perspectives seen and heard on that station, and second, that "the widest possible dissemination of information from diverse and antagonistic sources is essential to the welfare of the public."[13] Since the First Amendment prohibits the government from dictating programming content, the FCC decided that the diversity goal could best be achieved through diversification of ownership of radio and television licenses. Thus, for example, the FCC had restricted the number of radio and television stations that one person could own. Again, the underlying presumption of that restriction was simple: The greater the number of owners, the greater the mix of perspectives. But until the 1970s, when it was directed by the Court of Appeals to do so,[14] the FCC had not taken race into account in its efforts to promote broadcast diversity. It was only then that the FCC adopted the comparative hearing preference and distress sale policy.

By 1986, minorities still owned only 2.1% of the 11,000 radio and television stations in the country. That year, however, the FCC said that it would reconsider its minority preference policies. But Congress stepped into the fray: beginning in 1988, and again the following two years, Congress used its appropriations power to prohibit the FCC from spending any funds to examine or change the minority preference policies.[15]

When the policies were initiated — and at various stages thereafter — the FCC asserted that they had twin objectives: promoting broadcast diversity and remedying discrimination. The precise nature of that discrimination was somewhat nebulous, however; indeed, there is no evidence that either the FCC itself or white broadcasters had discriminated against minorities seeking to buy radio stations. By the time the specific legal challenges to the two policies reached the Supreme Court, the FCC was once again defending them. But it was now disavowing any remedial purpose, justifying the programs solely as fulfilling the non-remedial goal of program diversity.

Significantly, the United States Senate filed a brief supporting the policies. That brief explained how Congress had, over the years, monitored the FCC's efforts to increase minority ownership, and had barred the agency from discontinuing those efforts. The Bush Justice Department was on the other side, however. It argued that the FCC policies were unconstitutional, even though they were mandated by Congress.

III. Standards of Review

Constitutional litigation often boils down to the sometimes arcane question of what standard of review a court should apply to challenged government conduct. As Justice O'Connor put it in *Metro*, "[the] dispute regarding the appropriate standard of review may strike some as a lawyer's quibble over words, but it is not." *Metro*, 110 S. Ct. at 3033 (O'Connor, J. dissenting). In short, it tends to determine the outcome of a constitutional case.

A. STATE AND LOCAL GOVERNMENTS

1. THE PRE-*CROSON* DEBATE

In the constitutional challenges to affirmative action before *Croson*, the debate over the standard of review was always vigorous, but there was never a definitive resolution. The more conservative members of the Court, led by Justice Powell, had argued that "benign" racial classifications designed to remedy discrimination against minorities should be subject to strict scrutiny, the same rigorous standard of constitutional review given "invidious" racial classifications that discriminate against minorities. The premise here was that *any* use of race —even for assertedly "benign" purposes — is inherently suspect and tends to stigmatize racial minorities. As such, it violates the principle of color-blindness that had compelled the Court (beginning in the 1950s with *Brown v. Board of Education*, 347 U.S. 483 (1954)) to strike down laws that categorized individuals on the basis of race.[16] Furthermore, affirmative action was said to be at odds with prevailing constitutional norms, in which equality of opportunity for *individuals* is the touchstone. Affirmative action conflicts with these norms because it treats people only as members of groups. That "collectivist" conception of the Constitution elevates equality of *outcome* to supreme importance. This was wrong, said oponents of affirmative action, because the Constitution is negative charter of liberties that only guarantees equality of *opportunity*.[17]

For these reasons, it was said that when government resorts to racial classifications, the most exacting constitutional review was necessary. And under that standard — strict scrutiny — an affirmative action program must be (1) supported by a compelling interest, and (2) narrowly tailored to ensure that the program fits that interest. The "compelling interest" prong addresses whether the ends of the program are permissible. The focus is on the underlying factual predicate of the program — the nature and extent of evidence justifying it. If the ends are permissible, the "narrowly tailored" inquiry focuses on whether the means selected to achieve the ends are reasonable. Here, the focus is on the necessity of the law, its impact on nonminorities, and whether it is flexible or rigid.

Before *Croson*, the liberal justices (particularly Justices Brennan and Marshall) had advocated the adoption of a lesser standard of review for affirmative action than for other racial classifications. As Justice Blackmun explained, in order to get beyond the state-sponsored racism that the Court had declared unlawful in cases like *Brown*, it was necessary to take race into account; for only then could we begin to break down the barriers imposed by decades of discrimination. *Bakke*, 438 U.S. at 407 (opinion of Blackmun J.). Justice Marshall made the point quite eloquently:

> It is because of this legacy of unequal treatment that we now must permit the institutions of this society to give consideration to race in making decisions about who will hold the positions of influence, affluence, and prestige in America. For far too long, the doors to those positions have been shut to Negroes. If we are ever to become a fully integrated society, one in which the color of a person's skin will not determine the opportunities available . . . we must be willing to take steps to open those doors. *Id.* at 401-02 (opinion of Marshall, J.).

In short, given where we have been, and where we still need to go, the use of racial classifications as part of affirmative action plans can not be treated as the flip side of using race to degrade minorities. Claims that such uses of race violate the principle of color blindness defy "the reality that many 'created equal' have been treated within our lifetime as inferior both by the law and their fellow citizens." *Id.* at 327 (opinion of Brennan, White, Marshall and Blackmun, J.J.).

The liberals agreed that some level of heightened scrutiny should be required when governments use race, even for benign purposes. But strict scrutiny was too high a level of review for uses of race that "do[] not fit neatly into [the] prior analytic framework for race cases." *Id.* at 357. Accordingly, affirmative action plans should be reviewed under the more relaxed intermediate scrutiny, and would be constitutional if they served an "important" — rather than compelling — interest, and were "reasonably related" to that interest — rather than narrowly tailored to fit it. Again, these distinctions in terminology were not just mere semantics. The success of an affirmative action could rise or fall on the standard of review.

2. THE ADOPTION OF STRICT SCRUTINY IN *CROSON*

In *Croson*, by a 5-4 vote, the conservatives were successful in establishing that strict scrutiny should apply to affirmative action. Justice Stevens, who supplied the sixth vote invalidating the Richmond ordinance, reiterated his long-held view that there should be only one, uniform standard of constitutional review of any kind of legislative classification, racial or otherwise. 109 S. Ct. at 732 n.5. Therefore, Justice Stevens declined to "engag[e] in a debate over the proper standard of review to apply in affirmative action litigation." *Id.* at 732. Nevertheless, with Justice Brennan retired, and David Souter now on the bench, strict scrutiny, at least for state and local governments, is probably here to stay. In part, this is because of a shift in Justice White's position. In *Bakke*, Justice White had apparently accepted intermediate scrutiny as the appropriate level of review for affirmative action. But he moved towards strict scrutiny in *Wygant*, and firmly joined that camp in *Croson*.

Not surprisingly, the *Croson* dissenters called the adoption of strict scrutiny an "unwelcome development." *Croson*, 109 S. Ct. at 752 (Marshall, J., dissenting). They repeated their contention that benign racial classifications warrant a different, more relaxed standard of review "than the most brute and repugnant forms of state-sponsored racism. . . ." *Id.* The dissenters observed that strict scrutiny is generally reserved for legislative classifications that burden "suspect" groups, like blacks, who have been "'saddled with such disabilities, or subjected to . . . a history of purposeful unequal treatment, or relegated to . . . a position of political powerlessness . . . '"[18] According to the dissenters, any white contractors burdened by Richmond's MBE ordinance were undeserving of the protection that strict scrutiny affords, because there was no "indication that they have any of the disabilities that have characteristically afflicted those groups this Court has deemed suspect." *Croson*, 109 S. Ct. at 753 (Marshall, J., dissenting).

Responding to the dissenters, the *Croson* majority admonished that the level of review of racial classifications should not depend on the "ability of different racial groups to defend their interests in the representative process." *Id.* at 722. In other words, strict scrutiny would be appropriate even where a predominantly white legislature imposed the burdens of a racial classification upon a predominantly white constituency, rather than on a racial minority group. *Id.* (citing J. Ely, *Democracy and Distrust* 170 (1980)).

In any event, the majority said, were the standard of review of racial classifications to vary with the race of those burdened or benefitted, strict scrutiny was appropriate in *Croson* because blacks constituted a majority of the Richmond City Council and roughly 50% of the City's population, and thus the burdens of the MBE ordinance fell on a white "minority." *Id.* At bottom, this alternative defense of the application of strict scrutiny in *Croson* indicates that the Court is concerned that, "absent searching judicial inquiry into their justification," race-based classifications may be a product of simple "racial politics." *Id.* at 721. It also suggests that in the future, the Court will look particularly close at racial classifications that benefit groups whose members comprise a political majority of the enacting legislature and local population.

Justice Scalia's concurrence is illustrative. As he put it, the Richmond City Council's "enactment of a set-aside clearly and directly beneficial to the dominant political group, which happened also to be the dominant racial group . . . has no doubt happened before in other cities . . . and blacks have often been on the receiving end of the injustice." *Croson*, 109 S. Ct. at 737 (Scalia, J., concurring). In Justice Scalia's view, however, blacks cannot now reverse the tables and play their own brand of racial politics, because "[w]here injustice is the game . . . turn-about is not fair play." *Id.*[19]

3. THE MEANING OF STRICT SCRUTINY

Traditionally, when the Court subjects a legislative classification to strict scrutiny, the oft-cited maxim — "strict in theory and fatal in fact" — rings true.[20] In adopting strict scrutiny, however, the Court in *Croson* did not intend to go that far. Indeed, only Justice Scalia advocated the most narrow application of strict scrutiny, one that essentially would have imposed a near blanket ban on affirmative action.[21] Justice O'Connor's majority opinion makes plain that if the *Croson* ground rules are satisfied, then affirmative action plans will be upheld.

This has been evidenced in subsequent cases involving remedial racial classifications adopted by legislatures that, in the wake of *Croson*, sought to comply with the new ground rules. Those legislatures followed the rules and crafted their affirmative action plans accordingly.[22] Even classifications adopted before *Croson* can survive, if the legislature had done things differently than the Richmond City Council. *See Cone Corp. v. Hillsborough County*, 908 F.2d 908, 917 (11th Cir.), *cert. denied*, 111 S. Ct. 516 (1990) (county MBE ordinance "differ[ed] dramatically from Richmond Plan" and thus survived motion for summary judgment to declare ordinance unconstitutional in light of *Croson*.)

But for the most part, pre-*Croson* plans of state and local governments — particularly public contracting programs, of which they were over 200[23] — have been struck down in light of the Supreme Court's decision. These programs simply could not hurdle strict scrutiny: Their factual predicates were not "compelling" enough, and their means of achieving objectives not sufficiently narrowly tailored.[24] Other programs have simply been suspended in light of *Croson*, with governments recognizing that their plans just could not pass muster under the new rules.[25] And in many cases, the imposing obstacles created by the new rules have sapped the political will out of governments that might otherwise have tried to modify their programs or enact new ones.[26]

B. FEDERAL GOVERNMENT

In deciding the appropriate standard of review of the FCC programs at issue in *Metro*, the Court continued — and completed — an inquiry that had actually been initiated by Justice O'Connor in *Croson*. In that case, Justice O'Connor was forced to address the meaning of *Fullilove*, which Richmond claimed was "controlling" precedent. *Croson*, 109 S. Ct. at 717. Indeed, the Richmond Plan — like countless parallel MBE programs — was modeled on the set-aside upheld in *Fullilove*, and hinged, in part, on the findings that Congress had made in passing that set-aside.

Distinguishing *Fullilove*, Justice O'Connor suggested in *Croson* that the racial classifications of Congress that are designed to remedy past discrimination, such as the MBE program at issue in *Fullilove*, should not be subjected to strict scrutiny. In this regard, Justice O'Connor noted that the Court in *Fullilove* "did not employ 'strict scrutiny' or any other traditional standard of equal protection review." *Id.* at 717. Instead, it had reviewed the federal MBE plan cognizant of the "unique remedial powers of Congress under section 5 of the Fourteenth Amendment." *Id.* at 718. Here, Justice O'Connor repeated what Chief Justice Burger had said in *Fullilove*: "[I]n *no organ of government, state or federal [with more] remedial power than Congress* . . ." *Id.* (citing *Fullilove*, 448 U.S. at 483 (emphasis in original) (plurality opinion)). By contrast, Justice O'Connor observed, state and local governments "ha[ve] no specific constitutional mandate [like section 5] to enforce the dictates of the Fourteenth Amendment." *Croson*, 109 S. Ct. at 719. Rather, they are subject to the "explicit constraints" of section 1 of the Fourteenth Amendment, which restricts their ability to act on the basis of race.

Only two other Justices (Chief Justice Rehnquist and Justice White) joined the part of Justice O'Connor's opinion that preserved and distinguished *Fullilove*. However, the three dissenting Justices (Marshall, Brennan and Blackmun), all of whom had voted to uphold the federal set-aside at issue in *Fullilove*, agreed that Congress has broad power to enact race-based legislation. Furthermore, even Justice Scalia conceded that there was a "sound distinction" between the power of Congress and that of state and local governments in matters of race. *Id.* at 737 (Scalia, J., concurring). But Justice Kennedy questioned the attempt to distinguish *Fullilove*, remarking that "the process by which a law that is an equal protection violation when enacted by a state becomes transformed to an equal protection guarantee when enacted by Congress poses a difficult question for me." *Id.* at 734 (Kennedy, J., concurring). And Justice Stevens, who had dissented in *Fullilove*, did not address Justice O'Connor's points directly, but quoted at length from his *Fullilove* dissent. *Id.* at 733-34 (quoting 448 U.S. at 552-54). There, Justice Stevens had taken issue with the deference paid by the *Fullilove* majority to Congress.

Nevertheless, counting votes after *Croson*, it would have appeared that a majority of the Court might well refuse to apply strict scrutiny to affirmative action programs mandated by Congress. And in *Metro*, that proved to be correct: Justice Brennan, joined by the other *Croson* dissenters (Marshall and Blackmun), as well as Justices White and Stevens, held the FCC policies to the intermediate standard of review: The Court ruled that "benign race-conscious measures mandated by Congress. . . are constitutionally permissible to the extent that they serve important governmental objectives within the power of Congress and are substantially related to the achievement of those goals." 110 S. Ct. at 3009. Significantly, the majority said that this intermediate standard would apply to *all* such measures of Congress, whether they are remedial like the program in *Fullilove*, or non-remedial like the policies in *Metro. Id.*

To be sure, the congressional "action" at issue in *Metro* was fairly obscure. On the surface, it appeared that all Congress had done was to prohibit the FCC from repealing the minority preference policies. But the Court combed the record and located a number of hearings, reports and studies, all of which reflected sufficient activity to give the FCC policies more than just the stamp of Congress' imprimatur — they became Congress' programs.[27]

This was not just a matter of puffing up the record; the Court could legitimately point to a "long history of congressional support for [the FCC's minority preference] policies prior to the passage of the appropriations acts" that prohibited the FCC from repealing them. 110 S. Ct. at 3012. This record demonstrated that "for two decades. . . Congress ha[d] consistently recognized the barriers encountered by minorities in entering the broadcast industry and ha[d] expressed emphatic support for the Commission's attempts to promote programming diversity by increasing minority ownership." *Id.* Among other things, the Court noted that in 1982, Congress had directed that the FCC award preferences to minorities in random lottery allocations of licenses.[28] The Court also commented that as far back as 1969, long before the FCC even instituted its race-based licensing policies, Congress had considered a bill that would have eliminated the comparative proceeding in license renewal proceedings. But that bill was rejected, in part because of the fear that it would make matters even more difficult for minorities attempting to enter broadcasting.

Granted, the record of congressional action revealed no particularized findings of the sort demanded under strict scrutiny in *Croson*. But the Court ruled that what Congress had done was sufficient. Congress is simply different than the City of Richmond and could not be hamstrung by details. The Court recognized that Congress paints with a broad brush. It is uniquely competent to make sweeping decisions affecting matters of race, as well as broadcasting. The directive to the FCC that it not repeal the minority preference policies thus could not be viewed in isolation. Rather, it was the culmination of the wealth of experience in broadcast regulation *and* in addressing the problems of minorities in our society that Congress had acquired from decades of work in both fields.

Putting this all together, the Court ruled that *Croson* did "not prescribe the level of scrutiny to be applied" to affirmative action by Congress. *Id.* at 3009. And to help support its proposition, the majority cited Justice O'Connor's opinion in *Croson* distinguishing congressional programs from those of state and local governments.

But despite her emphasis in *Croson* on the broad power of Congress, Justice O'Connor wrote a vehement dissent in *Metro*.[29] She proclaimed that neither the part of her opinion in *Croson* that discussed *Fullilove*, nor *Fullilove* itself, justified the majority's "novel application of intermediate scrutiny" to affirmative action. *Id.* at 3031.

First, Justice O'Connor said that *Fullilove* involved an exercise of Congress' power to *remedy discrimination* under Section 5 of the Fourteenth Amendment. The FCC policies mandated by Congress, by contrast, were not intended to remedy discrimination (or least were not defended as such). As the majority pointed out, however, this line of reasoning ignored the fact that *Fullilove* also was rooted in Congress' Spending Power and the Commerce Clause. Under those provisions and its other "amalgam" of powers, Congress enjoys expansive constitutional power to act on the basis of race. 110 S. Ct. at 3008 n. 11. This was particularly true in broadcasting, said the majority, given Congress' broad regulatory authority over that industry. 110 S. Ct. at 3010, 3016.

Justice O'Connor's second argument was more telling. She said that "*Fullilove* preceded our determination in *Croson* that strict scrutiny applies to preferences that favor members of minority groups." *Id.* at 3032. The implication here is that *Croson* undercuts *Fullilove*: Justice O'Connor seemed to be saying that now there is only one standard of review for affirmative action — strict scrutiny — and it applies regardless of what body of government is involved, and apparently even if that body is Congress acting under Section 5 of the Fourteenth Amendment.

One commentator has tried to reconcile Justice O'Connor's positions in *Croson* and *Metro*. He has explained that Section 5 of the Fourteenth Amendment entitles Congress to considerable deference when it comes to fact finding and "selecting the means to a constitutionally permissible end . . . but it does not render an end that would be illegitimate if pursued by other legislative bodies constitutionally acceptable if pursued by Congress." In other words, it "does not manipulate the standard of scrutiny under which to evaluate" race-conscious action by Congress.[30]

It is possible that Justice O'Connor's idea about a single standard of review for affirmative action, as articulated in *Metro*, will eventually prevail. Justice Brennan has retired. And although David Souter the nominee said that the *Metro* decision was fine with him, David Souter the Justice may have a different view. Moreover, Justice Stevens also presents a wild-card: As indicated above, although he voted to strike down the Richmond MBE ordinance, Justice Stevens declined to join the majority's adoption of strict scrutiny for state and local affirmative action programs in *Croson*. For in Justice Stevens' view, standards of review are a distraction. Yet in *Metro*, Justice Stevens filed a separate concurrence, joining *both* the opinion and the judgment of the Court — which means that he did sign on to intermediate scrutiny for congressional programs. The problem here is that Justice Stevens, as evidenced by his votes and separate opinions in *Fullilove* and *Croson*, has never been a fan of *remedial* uses of race by legislatures — no matter who the legislature is. Instead (as explored more fully below), Justice Stevens has consistently argued "that a governmental decision that rests on a racial classification" makes more sense when intended to produce "future benefits," rather than remedying past wrongs. *Metro*, 110 S. Ct. at 3028 (Stevens, J., concurring). Since *Metro* involved racial classifications that were non-remedial, this — rather than the identity of the government actor that mandated the classifications — was probably the motivating factor for Justice Stevens. Thus, in a case involving a federal remedial racial classification, Justice Stevens could again refuse to take a position on the standard of review, and join Justice O'Connor and others in striking down the classification. If this is what occurs, then Justice Stevens' apparent "deference" to Congress in *Metro* will be confined to the specific setting of that case.

IV. Permissible Objectives of Affirmative Action

A. REMEDYING IDENTIFIABLE DISCRIMINATION

Under strict scrutiny, there seems to be only one governmental objective for affirmative action that satisfies the "compelling interest" prong: A racial classification cannot be used unless it is intended to *remedy identified discrimination*. One question here is "whose" discrimination can be redressed. In *Croson*, the Court rejected the holding below that state and local government affirmative action plans must be limited to redressing the effects of that government unit's own discrimination.[31] Thus, state and local governments can attempt to remedy the discrimination of private actors in various sectors and industries. But under strict scrutiny, that discrimination must be identified with great particularity and confined to the local jurisdiction. *Croson*, 109 S. Ct. at 720. Absent those particularized findings, an asserted remedial classification will only be redressing generalized, society-wide discrimination. And that, said the Court in *Croson*, is an insufficient justification for the race-based action of state and local governments, because it is too "amorphous", and "ageless into its reach into the past." *Croson*, 109 S. Ct. at 723.

In proving that a remedial racial classification is based on identifiable, rather than society-wide discrimination, *Croson* apparently requires state and local governments to have built a factual predicate rising to the level of prima facie evidence that the constitutional or statutory rights of minorities have been violated. *Croson*, 109 S. Ct. at 724.[32] This demands far more specific evidence of discrimination than the "generally framed test[s]," previously endorsed by both the *Wygant* plurality and Justice O'Connor in her *Wygant* concurrence, in which proof of "a prima facie violation . . . would appear to have been but one means of" building the requisite factual predicate. *Id.* at 754 n.12 (Marshall, J., concurring).[33] The *Croson* Court did not specify a quantum of evidence that amounts to prima facie proof of identified discrimination. Still, it is possible to glean from *Croson* some attributes of the prima facie evidence test.[34]

1. SPECIFIC FINDINGS FOR EACH GROUP

One thing *Croson* makes clear is that findings of discrimination must be specific for *each* minority group included as the beneficiaries of a remedial classification.[35] Like many racial classifications designed to remedy past discrimination, the Richmond ordinance defined minority to include not just blacks and Hispanics, but also Orientals, Asian-Americans, Eskimos and Aleuts. In fairness to the City, the Richmond ordinance simply employed the definition of "minority" contained in the MBE plan upheld in *Fullilove*. But in the Court's view, the ordinance was over inclusive because the City had only purported to remedy identified discrimination against blacks, and its evidence only related to that group. There was no indication that the City was also trying to eradicate discrimination against any of the other groups that received contracting preferences under the MBE plan.[36]

2. METHODS OF PROOF

a. Specific "instances" of discrimination

The Court said in *Croson* that the "mere recitation" that a racial classification has a benign, remedial purpose "is entitled to little or no weight" in evaluating whether it is premised on a factual predicate of identified discrimination. *Croson*, 109 S. Ct. at 724. At the other extreme, evidence of specific instances of discrimination are presumably given great weight in the prima facie test. This kind of evidence can presumably derive from testimony in previous court litigation or in administrative hearings. Or, it could come through informal complaints lodged with proper authorities. And perhaps even reports of authoritative bodies, such as civil rights commissions, would count heavily.

A number of cases illustrate how this type of evidence can be aggregated and used to support remedial racial preferences. In *Higgins v. City of Vallejo*, 823 F.2d 351 (9th Cir. 1987), *cert. denied*, 109 S. Ct. 1310 (1989), a pre-*Croson* case, the City met the requisite factual predicate because it based a remedial racial classification on specific findings of discrimination in a report prepared by the California Fair Employment Practices Commission. Similarly, in *Cone Corporation v. Hillsborough County*, a post-*Croson* case, the court pointed to "clear evidence that MBE Contractors [had] made numerous complaints to the County regarding discrimination by prime contractors." 908 F.2d at 916. Furthermore, the legislature in that case had conducted "prolonged studies of the local construction industry that indicated a continuing practice of discrimination." *Id.* at 915. The same sort of evidence underpinned the post-*Croson* MBE ordinance at issue in *Associated General Contractors:* The local Human Rights Commission "heard testimony from 42 witnesses and received written submittals from 127 [others]." Subsequently, it conducted "ten additional public hearings" and received "additional written testimony." 748 F. Supp. at 1445 n. 3. All of this activity produced a substantial record of discrimination, one that was deemed "too lengthy to summarize." *Id.* at 1451.[37] By contrast, in *Long v. City of Saginaw*, another post-*Croson* case, the court found it significant that the plan at issue was not supported by any "recorded complaint" [or] adjudication [by] any local, state, or federal administrative agency nor state or federal court, charging the city of Saginaw with discrimination . . . ." 911 F.2d at 1197.

b. Statistical evidence

The Court in *Croson* also made clear that statistical evidence may support an inference of identified discrimination in a particular sector or industry. However, the Court indicated that this would be true only when the statistics compare *relevant* figures. 109 S. Ct. at 725 (citing *Hazelwood School District v. United States*, 433 U.S. 299 (1977)).

Richmond had said that in the five years from 1978-83, 0.67% of its contracts were awarded to blacks, even though blacks comprised half of the City's population. It argued that these figures created an inference of discrimination against blacks in the local construction industry. But the Court ruled that comparisons between general population statistics for blacks in Richmond and the number of City contracts awarded to blacks were not probative of *identified* discrimination against Richmond's black contractors, let alone against contractors from any of the other minority groups that stood to benefit from the ordinance. *Id.* at 725, 727-28. Similarly, the Court found the City's evidence that there were virtually no minority members in local construction trade associations to be irrelevant: Since contracting is a skilled job, the Court said, more probative statistical inquiries would have compared the number of qualified blacks in the relevant labor market with the dollar value of the contracts they received, and also compared the number of black contractors qualified to join the local trade associations with the number of blacks in those associations. *Id.* at 725.

The Court did say that gross statistical disparity between these sets of figures might be prima facie evidence of discrimination. Even then, however, the Court intimated that such proof might have to be supplemented with testimonial evidence of specific instances of discrimination against blacks: statistics alone might not be sufficient. *Id.* at 729. After *Croson*, the question whether numbers by themselves can suffice has not arisen. But in cases where relevant statistics were found probative of discrimination, the figures were "corroborated" by other types of evidence. In *Cone Corporation*, the legislature's use of "correct" statistics was bolstered by the testimonial evidence of minority contractors. 908 F.2d at 916. Similarly, in *Associated General Contracts*, the "statistically significant disparities" were supplemented with ample hearing testimony. *See* 748 F. Supp. at 1443.

The *Croson* restrictions on the use of statistical evidence raise other complex problems. For instance, where discrimination has been especially effective, statistical comparisons using the "right" figures (*e.g.*, the number of minorities qualified to perform a certain job and their representation in that particular job category) may fail to reveal the actual effect of that discrimination. In this situation, state and local governments should probably be permitted to try and explain that the number of qualified minorities is artificially low precisely because of past discrimination. For instance, an economic analysis could show that racial discrimination has reduced or precluded minority participation in a particular job, and therefore skewed the statistical comparison. Similarly, studies could demonstrate that more minorities would have been qualified to do the job in 1991 "but for" discrimination that existed, and that may have even been legal under Jim Crow regimes, in 1961.[38]

Furthermore, the outcome of the statistical inquiry necessarily hinges on the geographical scope of the relevant labor market. In *Croson*, however, the Court did not say whether the relevant labor market could include areas outside of the jurisdiction of the government unit seeking to employ a remedial racial classification. To be sure, the Court did criticize the Richmond plan on the grounds that it awarded preferences to MBE's "from anywhere in the country." *Croson*. 109 S. Ct. at 729. However, this aspect of the geographic scope of the Richmond ordinance related to whether it was narrowly tailored. The Court was not necessarily saying that Richmond would have been precluded from giving benefits to minorities who lived outside of the City if, in fact, the relevant labor market for public contracting was regional or national.

Finally, an open question is whether the panoply of rules governing the use of statistical evidence in Title VII disparate impact cases, which the Court "reinterpreted" in *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989), apply when a state or local government attempts to prove the existence of discrimination through numerical data. At least one commentator has suggested that those rules will in fact apply in the affirmative action context, thus further restricting the use of statistics to justify race-conscious action.[39] For example, under *Wards Cove*, states and cities would have to do more than present a statistical model of discrimination; they would have to prove a causal link between a particular practice and its disparate impact on minorities.

B. REMEDYING SOCIETY-WIDE DISCRIMINATION

The distinctions that Justice O'Connor drew in *Croson* between federal and state power led her to conclude that, in building a factual predicate for the use of remedial racial classifications, Congress does not have to make findings of discrimination with the same degree of specificity as states and cities.[40] While state and local governments may act on the basis of race only to remedy identified discrimination in their jurisdictions, Justice O'Connor said that "Congress may identify and redress the effects of *society-wide discrimination* . . . ." *Croson*, 109 S. Ct. at 719 (emphasis added).

Justice O'Connor did not explain what she meant by the phrase "effects of society-wide discrimination." More likely than not, Justice O'Connor did not "mean that Congress [can] act without *some* quantum of particularized evidence of the effects of societal discrimination in [a particular] industry."[41] Under this reading, mere societal discrimination alone — slavery and Jim Crow laws, for example — is an insufficient predicate for affirmative action. After all, it is just that sort of discrimination that Justice O'Connor has said is too amorphous a predicate for race-conscious action. Moreover, in *Fullilove* itself, the Court claimed that what was being remedied was the *identifiable* present-day consequences of historical society-wide discrimination on minority contractors.[42] Adding this all up, it would seem that the past must be shaping the present in some concrete fashion in order for Congress to act on the basis of race to redress discrimination.

This principle guided Judge Silberman in the appeals court decision on the FCC's distress sale policy. Applying that principle, Judge Silberman found no evidence linking past discrimination to the underrepresentation of minorities in broadcasting. He therefore deemed the factual predicate underlying the distress sale policy — to the extent that it had a remedial objective — to be insufficient. *Shurberg Broadcasting, Inc. v. FCC*, 876 F.2d 902, 914 (D.C. Cir. 1989). Judge Silberman contrasted this with the "abundant evidence" on which the remedial racial classification at issue in *Fullilove* was allegedly predicated. *Id.* Justice O'Connor's *Croson* opinion described that "abundant evidence" as a "nationwide history of past discrimination [that] had reduced minority participation in federal construction grants." *Croson*, 109 S. Ct. at 718.

Significantly, however, Congress adopted the federal MBE set-aside at issue in *Fullilove* "without any congressional hearings or investigations whatsoever;"[43] there were no *explicit* congressional findings of past discrimination underlying the program. *See* Fullilove, 448 U.S. at 478 (plurality opinion). Instead, Congress relied mostly on earlier studies and reports, prepared in conjunction with previous legislation, that supported the conclusion that "private and governmental discrimination had contributed to the negligible percentage of public contracts awarded minority contractors." *See id.* at 502-03 (Powell, J., concurring). This suggests that in instituting remedial affirmative action programs, Congress may draw on the extensive experience in identifying and addressing the problems of racial discrimination through repeated legislative efforts. When it adopts a remedial racial preference, Congress is not acting on a blank slate. As Justice O'Connor herself admonished, Congress has already "made *national* findings that there has been societal discrimination in a *host of fields*."[44] Thus, Congress does not have to redocument the fact and history of the effects of past discrimination in adopting its next remedial racial preference. Above all, this relaxed evidentiary requirement is in keeping with the review of the "record" of congressional action in *Metro*, and with the intermediate scrutiny that the Court deemed applicable to congressional affirmative action plans.

Obviously, Congress has to do something. Like the City of Richmond, it cannot get by with "the mere recitation of a benign purpose, which the majority in *Metro* noted.[45] But since *Metro* did not address the remedial objectives underlying the FCC policies, it remains uncertain exactly what sort of evidentiary record Congress must compile before enacting a remedial racial classification. In short, the precise meaning of *Fullilove*, in light of *Croson* and *Metro*, is still up in the air.[46]

C. NON-REMEDIAL JUSTIFICATIONS FOR AFFIRMATIVE ACTION

Societal and identifiable discrimination represent two competing predicates for affirmative action. They have at least one thing in common, however; both involve remedies for discrimination of some sort, either society's bad acts or more particularized misconduct. Thus, they justify the use of racial classifications as "precise penance for . . . specific sins of racism . . . committed in the past. . . ."[47] In short, the two predicates look backward. There is, however, an alternative vision of affirmative action — one which entails *non-remedial* objectives. It was that vision which was at issue in *Metro*. Prior to that case, it had been explored most fully by Justice Stevens.

In his *Croson* and *Metro* concurrences, Justice Stevens repeated the view, which he articulated most notably in dissent in *Wygant*, that government units should look forward and adopt racial classifications for non-remedial purposes. *Croson*, 109 S. Ct. at 731 (Stevens, J., concurring); *Metro*, 109 S. Ct. at 3028 (Stevens, J., concurring). In *Wygant*, Justice Stevens had suggested that a public school system might want to hire teachers according to their race as a means of integrating the teaching staff in a school with many minority students. Diversifying the faculty would confer a "future benefit" on the students and the community as a whole, and would be permissible, even if there were no evidence of discrimination in the hiring of minority teachers. *Wygant*, 476 U.S. at 313-15 (Stevens, J., dissenting). By contrast, in *Croson*, Justice Stevens said that if the City of Richmond had proffered a non-remedial objective for its MBE plan, he would have rejected it. In his view, there would have been no future benefit analogous to diversifying the faculty in *Wygant*.[48]

Justice Stevens was not the only one who had articulated the non-remedial, diversity theory of affirmative action before *Metro*. Most notably, in *Bakke*, Justice Powell said that a state university might have a compelling interest in classifying applicants according to race in order to promote racial diversity among the student body, This, in turn, would contribute to a "robust exchange of ideas" in a setting — academia — where that kind of discourse was to be encouraged. *Bakke*, 438 U.S. at 313 (1978) (opinion of Powell, J.).

Before *Metro*, the Court as a whole had not yet squarely addressed the permissibility of non-remedial objectives for affirmative action. But this was *the* question in *Metro*, because the FCC defended its minority preference policies as a means of increasing the diversity of perspectives conveyed over the nation's radio and television airwaves: it eschewed any remedial objective for the policies.

Applying intermediate scrutiny, the majority determined that promoting broadcast diversity was "an important governmental interest." The Court analogized that interest to the race-conscious admissions policies designed to promote racial and ethnic diversity among the student body that

Justice Powell had said was a "compelling interest" in *Bakke*. The Court in *Metro* reasoned that if promoting diversity in the academic setting was a legitimate predicate for affirmative action, then the same had to be true in broadcasting. For it is axiomatic that radio and television have a "uniquely pervasive" influence in American life.[49] And for better or worse, these media may play a more central role today in "educating" the public and promoting the exchange of ideas than do universities. Therefore, the Court said that Congress and the FCC could take steps — through its minority preference policies — to ensure that the viewpoints conveyed in broadcasting reflect the diversity of the nation as a whole. *Metro*, 110 S. Ct. at 3010. The evidentiary question before the Court was whether those steps actually do promote a greater diversity of perspectives in radio and television.

In addressing this question, the dissenters claimed the "diversity thesis" — both in the broadcasting *and* university contexts — rested on a stereotypical presumption that there is such a thing as a "minority perspective" to convey. Moreover, even if there were such a perspective, the dissenters said, the diversity thesis presumes that all minority students or broadcasters share that perspective.[50]

The majority answered the question with some quantitative proof: It cited several studies showing a nexus between minority ownership and diverse perspectives. Moreover, that nexus is reflected not only in programming, but also in the other considerations that come with the terrain in broadcasting, such as selection of news stories, editorial viewpoints, advertising, hiring key staff, and community relations. *Metro*, 110 S. Ct. at 3017-3018. But ultimately, the majority responded with what Justice Powell had said was just common-sense: Race or ethnicity necessarily affects who we are. *See Metro*, 110 S. Ct. at 3017; *Bakke*, 435 U.S. at 312-14.[51] This is not to say that all blacks "think alike." And it is not to say that black broadcasters will only show black-oriented programming. But a black broadcaster *is likely* to think twice before showing "Birth of a Nation," and an Asian may think twice about showing Charlie Chan movies.[52] As Justice Stevens posited during the oral argument in *Metro*, imagine if our nation had 100 radio stations, none owned by blacks. Suppose then that the mix is varied, and we get a few black broadcasters. It is hard to deny that even this change will necessarily alter what is heard *overall*. This is the core of the FCC policies: They acknowledge that race and ethnicity are bound to make a difference. While in any particular case, the proposition may prove false, in the aggregate, the greater inclusion of minority owners *will* have consequences. *Metro*, 110 S. Ct. at 3016.

One of the key questions after *Croson* and *Metro* is whether *state and local* governments may also use race for non-remedial objectives, or in other words, whether such objectives rise to the level of a compelling governmental interest, as Justice Powell said they could. The *Metro* dissenters said no. *See* 110 S. Ct. at 3034 (O'Connor, J. dissenting) (under strict scrutiny, the only compelling interest to support the use of racial classification is remedying discrimination); *id.* at 3044 (Kennedy, J., dissenting) (criticizing decision to "allow the use of racial classifications untied to any goal of addressing the effects of past discrimination"). In fact, Justice O'Connor had seemed to have ruled them out in *Croson*, where she admonished that racial classifications must be "strictly reserved for the remedial setting."[53]

The question of the availability of non-remedial justifications for affirmative action is fundamental for public universities, which generally do take race into account in admission policies as a means of promoting diversity — the very policy that Justice Powell sanctioned in *Bakke*. In the recent controversy over minority targeted scholarships, the Bush Administration cited Justice Powell's *Bakke* opinion and said that race could indeed be a factor in awarding scholarships where the university is seeking to diversify its student body.[54]

The question of whether non-remedial objectives for affirmative action are available to state and local governments can arise in many contexts besides university admissions. For example, a municipality could decide to hire police officers on the basis of race, even if there were no evidence of discrimination in the hiring of minority police officers. The thesis here would be that a more racially diverse police force could help defuse racial tensions. *Cf. United States v. Paradise*, 480 U.S. 149, 167-68 n.18 (1987) (plurality opinion) ("generalized government interest in effective law enforcement" could justify race-conscious hiring intended to "restore community trust in the fairness of law enforcement . . .").

Perhaps most importantly, non-remedial uses of race are more attractive politically, and probably easier to justify to a doubting electorate, than purely remedial uses. Properly understood, the diversification of broadcasting, university student bodies, and municipal police forces may confer benefits that redound to society as a whole: All members of the listening and viewing audience benefit when they hear and see a wider spectrum of perspectives on radio and television.[55] All college students benefit when they are exposed to peers from diverse racial and ethnic backgrounds. And the municipality in its entirety benefits when a racially mixed police force helps to calm tensions. In short, in all of these uses of race, the minority who gets the preference is not the only one who reaps the benefits.

Remedial justifications strike many as less palatable, precisely because the award of a contract to an MBE to redress past discrimination seems to constitute a naked preference to that MBE alone. And the preference is even harder to defend when the specific beneficiary is a "fat cat" minority entrepreneur who has "made it." As discussed below, the "fat cat" quandry does not arise when a racial preference is not designed as a remedy for the beneficiary.

But all of this is too simplistic: The very reason why we might want to have a non-remedial affirmative action plan is because of past discrimination. Thus, even race-conscious action designed primarily to promote racial diversity will have a remedial component. Take broadcasting as an example: The legacy of past historical discrimination continues to impose substantial barriers — primarily economic ones —

to minority entry into broadcasting. This is compounded by the fact that broadcasting is a mature industry; the frequency spectrum is already well-saturated and most of the real valuable licenses were allocated decades ago, when discrimination against minorities was pervasive. So the present lack of diversity is attributable to past discrimination. This same scenario can be played out in higher education and law enforcement, with somewhat different forms of discrimination accounting for minority underrepresentation and under achievement in those sectors. In any event, the message here is that remedial and non-remedial plans can reinforce each other.

By the same token, plans that are ostensibly purely remedial can confer the same sort of collective benefits that seem to make non-remedial plans more "savory." For instance, remedial preferences of the sort at issue in *Croson* and *Fullilove* attempt to bring into the mainstream of public employment and contracting groups that have been previously excluded. They give minorities access to positions of significance and provide them with a stake in the community that they may not have held before. And if a previously disaffected and disillusioned group becomes integrated into the community, the larger body politic *does* benefit.[56]

V. Means to the End of Affirmative Action

Even where state and local governments have a compelling interest in classifying individuals on the basis of race, the classification will still be unconstitutional if it is not narrowly tailored to achieve that interest. According to the Court, this "ensures that the means selected closely 'fit'" the ends. *Croson*, 109 S. Ct. at 721.

In determining whether a racial classification designed to benefit minorities is narrowly tailored, the Court has considered several factors, including: (1) the efficacy of alternative remedies; (2) whether the classification contains a waiver provision; (3) the burden of the classification on nonminorities; (4) the duration and flexibility of the classification; and (5) the relationship of the numerical goals in the classification to the relevant labor market.[57]

Notably, these factors have been applied in cases involving Congress' affirmative action programs, even though after *Metro*, the relevant inquiry there is not whether the means are "narrowly tailored" to an interest, but whether they are reasonably related to it. In *Croson*, however, Justice O'Connor admonished that "the breadth of discretion in choice of remedies may vary with the nature and authority of the governmental body." *Croson*, 109 S. Ct. at 719 (quoting *Fullilove*, 448 U.S. at 515-516 n. 14) (Powell, J., concurring). Thus, although a federal remedial racial classification "call[s] for close examination, the Court was . . . 'bound to approach [its] task with appropriate deference to Congress. . . .'" *Croson*, 109 S. Ct. at 717 (quoting *Fullilove*, 448 U.S. at 472 (plurality opinion)). Indeed, in examining the means to the ends of the federal MBE set-aside, Chief Justice Burger's *Fullilove* opinion did not formally apply the "narrowly tailored" factors. Justice Powell did in his concurrence, but he paid great deference to Congress' choice of remedy, saying that it should be upheld if the "means selected are reasonable and necessary." *Fullilove*, 448 U.S. at 510 (Powell, J. concurring). According to Justice Powell, this "test allowed the Congress to exercise necessary discretion." *Id.* Yet *Metro* applied the narrowly tailored factors without explicit reference to the deference that drove Justice Powell in *Fullilove*. This paper discusses those factors without differentiating between state/local programs and those of Congress.

A. ALTERNATIVE REMEDIES

Prior to *Croson*, the question of the efficacy of alternative measures arose in various forms. The question was sometimes simply viewed in conjunction with the other factors of the narrowly tailored test. Thus, a reviewing court was arguably free to pay less attention to the fact that an alternative might have been available when, for example, a race-conscious classification satisfied the other "narrowly tailored" factors.[58] In other cases, the question did not center on whether the other alternatives were race-neutral, but rather whether they were "less intrusive" than the measure actually chosen.[59]

In *Croson*, the Court clarified what this factor is all about. The Court ruled that governments must, at minimum, consider the efficacy of race-neutral alternatives before adopting a race-conscious classification. *Croson*, 109 S. Ct. at 728. This requirement seems to reflect a concern that "affirmative action plans have not benefitted during their formulation from the thorough deliberation that such plans require. Upon inspection, many plans appear to be the products of hasty decisions to 'do something.'"[60] This was conspicuous in *Croson*: The City Council met for just two hours before enacting its set-aside. This surely jaded the Court's view of the Richmond ordinance.[61] *Metro* was different. There, the Court referred to decades of deliberations at the FCC and Congress reflecting "considered judgment" of the need for race-conscious action. 110 S. Ct. at 3023.

Aside from the Court's process-oriented concerns, the Richmond City Council was also taken to task because there was no indication in the record that it had engaged in any debate on the efficacy of *specific* race-neutral alternatives. The Court even listed some examples — lowering the bonding requirements for, and giving financial assistance to, economically disadvantaged businesses, of which MBE's would generally be a subset. *Croson*, 109 S. Ct. at 728; *see also id.* at 738 (Scalia, J., concurring). In contrast, the Court in *Metro* said that the FCC had considered and rejected such options, 110 S. Ct. at 3022 n. 42, as part of its "long and painstaking consideration of all alternatives." *Id.* at 3019.

Significantly, the Court in *Croson did not* say that race-neutral alternatives had to be tried and exhausted.[62] And lower courts have not injected such a requirement into the calculus.[63] The Court failed, however, to define what constitutes adequate consideration of alternatives. (In *Metro*, this was not a problem because the majority said that many race-neutral measures that the dissenters suggested had actually been employed and proven ineffectual. 109 S. Ct. at 3019-22).

One option that may satisfy the *Croson* standard is for a state or local government to hire experts to analyze thoroughly why race-neutral programs would be insufficient. Another option is to "include in the [race-conscious] law all of the race-neutral measures suggested in *Croson*." *Cone Corp. v. Hillsborough County*, 908 F.2d at 916. Here, the "array" of devices could simply be built into an MBE plan, thus "lend[ing] to [its] flexibility." *Id.* at 916 n.11. The court in *Cone Corp* did not explain how this was supposed to work, however. As an absolute fail-safe, legislators might actually prefer to adopt — at least temporarily — programs that give preferences to individuals on the basis of social and economic status, not race, and *without* incorporating them into a race-conscious measure, as the legislature did in *Cone Corp.* If this strictly race-neutral approach fails to meet its objectives, there may then be grounds for enacting a pure race-conscious classification.

B. WAIVERS

The Court in *Croson* dealt with the waiver provision in the Richmond ordinance only briefly. The Court criticized the provision because it "focuse[d] solely on the availability of MBE's; there [was] no inquiry into whether or not the *particular MBE seeking a racial preference ha[d] suffered from the effects of past discrimination* . . . ." 109 S. Ct. at 729 (emphasis added).

This requirement seems to conflict with the Court's decisions in *Wygant, Sheet Metal Workers* and *Paradise*, all of which said that it is not a constitutional defect for a race-based remedial measure to benefit individuals who themselves were not discriminated against. If *Croson* really means that remedial racial preferences must be waived where beneficiaries cannot prove that they have suffered from discrimination or disadvantage, then the "victims only" requirement for affirmative action — advocated by the Reagan Administration and rejected in the Court's previous cases — may have entered through the back door of the "narrowly tailored" test. This was certainly the view of the more conservative judges in the lower court decisions regarding the FCC policies at issue in *Metro*.[64] The "victims only" issue did not arise in its usual form when the policies were considered by the Supreme Court. The need to identify a "victim" is relevant where an affirmative action program is remedial. Since no remedial objective for the FCC policies was proffered at the Supreme Court, the question of whether "non-victims" had to be weeded out from the pool of beneficiaries was not broached.[65]

Nevertheless, the concept of tailoring the pool of beneficiaries came up in a somewhat different guise in *Metro*: whether the recipient of a licensing preference had to demonstrate that he or she possesses a "minority viewpoint." The dissenters thought the FCC policies were not narrowly tailored precisely because there was no "case-by-case determination. . . to ensure that the award of a particular preference advances the asserted interest" in promoting broadcast diversity. 110 S. Ct. at 3039 (O'Connor, Jr., dissenting). As indicated above, however, the majority refused to impose such a requirement, relying instead on the "predictive judgment [that] there is a nexus between minority ownership and broadcast diversity[,] [as] corroborated by a host of empirical evidence." *Id.* at 3017. Nor had Justice Powell required the university in *Bakke* to waive its admissions preference if a beneficiary did not have a "different perspective" to bring to the campus.

C. IMPACT ON NONMINORITIES

The Court has recognized that affirmative action necessarily calls on "innocent persons" to bear some degree of burden. *See, e.g., Wygant*, 476 U.S. at 281 (plurality opinion). That burden is too high, however, when affirmative action either divests whites of existing contracts and thus "unsettle(s) legitimate firmly rooted expectations,"[66] or visits the entire burden on particular whites, instead of whites as a whole.[67]

Thus, for example, in *Wygant* the Court invalidated a remedial racial classification that caused the layoffs of some white teachers.[68] By contrast, the Court has upheld minority hiring and promotion goals because they neither throw whites out of their current positions nor impose burdens on distinct whites.[69] However, "it is too simplistic to conclude . . . that hiring [or other employment] goals withstand constitutional muster whereas layoffs do not . . . The proper constitutional inquiry focuses on the effect, if any, and the diffuseness of the burden imposed on nonminorities, not on the label applied to the particular employment plan at issue." *Sheet Metal Workers*, 478 U.S. at 488 n.3 (Powell, J., concurring).[70]

The Court essentially applied this traditional burden analysis in *Metro*. It determined that both the comparative hearing preference and distress sale imposed an acceptable burden on nonminorities. Indeed, the Court called that burden "slight," since nobody has a "settled expectation" of being awarded a broadcast license. 1090 S. Ct. at 3026. In terms of sheer numbers, the Court was undoubtedly correct that the burdens are minimal: Minority status in a comparative hearing proceeding is rarely the "dispositive factor" in awarding licenses, *id.* at 3026 n. 50, while the distress sale has involved "a tiny fraction — less than four tenths of one percent — of all broadcast sales since 1979." *Id.* at 3027. Indeed, as of June 1990, only 38 such sales had taken place since the policy had been initiated. *Id.*

Nevertheless, the dissenters claimed that the FCC policies fix an undue burden on minorities because of the "exceptionally valuable" nature of broadcast licenses, and the "rare and unique opportunity" such licenses provide "to serve the local community." 110 S. Ct. at 3043. But if "value" and the "uniqueness" of opportunities are to be the touchstone of undue burden, then almost any job or university admissions slot could fit the bill, in which case, there could never be affirmative action.

D. FLEXIBILITY

The more flexible an affirmative action program, the more likely it is to be considered narrowly tailored. One element of flexibility is the existence of a definitive end date for the classification. This ensures that race-based decisions and their accompanying burdens on non-minorities are only temporary. *See Sheet Metal Workers*, 478 U.S. at 479 (plurality opinion).

The end-date issue was somewhat sticky in *Metro*. The majority said the FCC policies were sufficiently time-bound because the congressional appropriations measures mandating their use were of "finite duration," namely year-by-year. 109 S. Ct. at 3024. According to the majority, this ensured "future reevaluation" of the need for the policies. *Id.* The policies will only be needed "once sufficient diversity has been achieved." *Id.* But therein lies the rub: How do we know when that time comes?

The best answers are, first, that we are simply nowhere near optimum diversity in broadcasting now, and, second, that we will be able to perceive the subtle differences that diversity of ownership produces at some later date. Another possible answer would be to amend the policies and set a specific "goal" of a certain percentage of minority ownership. For the Court itself has said that the lack of a precise end date is less troubling when a racial classification prescribes fluid goals, rather than a rigid quota that "sets aside positions according to numbers." *Johnson*, 480 U.S. at 640. This notion that goals are more desirable than quotas stems from Justice Powell's opinion in *Bakke*, holding that the university could not reserve a specified number of spaces for minority students, but could take race into account as one factor in the admissions decision. *Bakke*, 438 U.S. at 316-318. In *Bakke*, it was plain to see that the university's actions involved a quota. Unfortunately, distinguishing goals from quotas is not always easy, as *Metro* itself showed.

The Court struggled with this problem in *Sheet Metal Workers*. There, five members of the Court said that a "goal" of 29.23% minority membership in a trade union was not inflexible. To support this conclusion, Justice Brennan pointed out that the deadline for achieving the goal had been adjusted twice, and that there were continual changes in the size of the "classes from which the union drew its members to account for the fact that economic conditions prevented [the union] from meeting their membership targets." *Sheet Metal Workers*, 478 U.S. at 478 (plurality opinion). As such, the plan was not intended "simply to achieve and maintain racial balance, but rather [acted] as a benchmark against which the court could gauge the [union's] efforts to remedy past discrimination." In dissent, Justices O'Connor and White claimed that irrespective of the fine-tuning, what the majority labeled a "goal" actually operated as a "rigid membership quota," because it required the racial composition of the union to mirror the relevant labor pool without any possible deviation. *Sheet Metal Workers*, 478 U.S. at 498 (O'Connor, J., dissenting); *Id.* at 499 (White, J., dissenting).

Johnson provided somewhat more guidance for distinguishing goals from quotas. There, the Court found sufficient flexibility because gender was only one of many factors the employer considered in making promotion decisions. Furthermore, the employer's plan in *Johnson* set "modest short-term goals" of promoting a small percentage of women to a certain skilled job, and took into account demographic and economic variables that could have made compliance with the plan's long-term objectives impractical.[71]

Nevertheless, after *Johnson*, lower courts continued to struggle trying to separate goals from quotas. *Hammon v. Barry* is illustrative. In that case, a three judge panel of the D.C. Circuit purported to apply *Johnson*, but the labels that two of the panel members attached to a plan that required at least 60% of each entering class of municipal firefighters to be black were worlds apart. Judge Starr called the plan a "telltale, single-factor, rigid quota," and then for good measure, a "hard-core, cold-on-the-docks quota, nothing less." Judge Starr concluded that it was a far cry from what had been embraced in *Johnson*. *Id.* at 79. Citing *Johnson*, Judge Mikva found that the plan did not authorize hiring solely by race. Rather, the City could hire only those who had passed an exam that made them eligible for the entering class. It was from that pool that the City arrived at its figure of 60% (the percentage of blacks that made up the class that passed the test.) Furthermore, for Judge Mikva, the City's "goal" of attaining parity between the percentage of black firefighters and the percentage of blacks in the City was only a long-term aspiration. The City's short-term objectives were, like the short-term plan in *Johnson*, quite modest. *Id.* at 89-90 (Mikva, J., dissenting).

The issue came to the fore in *Metro*, particularly with respect to the distress sale policy. Unlike the comparative hearing preference, in which race is just one "plus factor" among many in the allocation of licenses, race is the *only* factor in a distress sales: Nonminorities cannot purchase licenses at a distressed price. For the dissenters, this created a "specialized market reserved exclusively for [minorities], and thus involved a "100% set aside," the most "rigid quota" conceivable. 110 S. Ct. at 3043 (O'Connor, J., dissenting).

To this, the majority said that the distress sale policy reserved no fixed number of licenses for minorities. The number of sales depends only on the willingness of a nonminority to sell his license to a minority in order to salvage some value for it. *Id.* at 3027. The majority also cited the relative insignificance of distress sales in the larger scheme of things, given the almost infinitesimal number of licenses that had been awarded under the policy. *Id.* And it pointed out the "specialized market" for minorities was dwarfed by the greater market of nearly 11,000 stations for which nonminorities can compete. *Id.* But, interestingly, the Court did not say that *Congress* is free to create "100% quotas" and "sheltered markets" for minorities if it so desires. In *Fullilove*, the Court had fallen back on the principle of deferring to broad congressional authority in upholding the choice of a fixed quota (as opposed to a goal) in the federal public works program at issue.

The tug-of-war over minority targeted scholarships implicates the sheltered market problem. The Bush Administration declared that such scholarships are like set-asides, since nonminorities cannot compete for them. But ironically, the Administration took the position that Justice Brennan did not in *Metro*: It suggested that Congress could create scholarships specifically reserved for minorities, whereas state and local governments could not.

Actually, the *Metro* dissenters also complained about the multi-factored comparative hearing preference as well, because they said race proved dispositive in a number of hearings. 110 S. Ct. at 3043. But this is akin to the dissenters' objection that the FCC policies impose undue burdens because sometimes white people lose — if it is a problem that race sometimes is dispositive when it used as one of many factors, then even the most flexible affirmative action program is doomed.

E. RELATIONSHIP OF NUMERICAL GOAL OR QUOTA TO LABOR MARKET

This factor involves numbers: how big can the racial preference be. Before *Croson*, there was no definitive word from the Court on this front. The only real mathematical guidance came in *Fullilove*, where Justice Powell said the 10% set-aside was sufficiently tailored because it was "halfway" between the near zero number of contracts minorities were getting and the 20% figure that represented the country's minority population. *Fullilove*, 448 U.S. at 513-14 (Powell, J., concurring). The City of Richmond defended its 30% set-aside on the same premise: It was halfway between 0 — the number of contracts awarded to blacks — and 50 — the black population of Richmond. But in *Croson*, the Court demanded much more mathematical precision. It held that the numerical figures used in a racial preference had to bear a relationship to the relevant labor market. Thus, the 30% set-aside in the Richmond ordinance was not sufficiently tailored because it was tied to the minority population of Richmond, and, as such, "rest[ed] upon the 'completely unrealistic' assumption that minorities will choose a particular trade in lockstep proportion to their representation in the local population."[72]

After *Croson*, it is unclear whether the Court would allow a numerical goal to be higher than the number of qualified minorities in a relevant labor market if the latter is found to be artificially low due to past discrimination. For example, if only 1% of the eligible contractors for an MBE program are minorities, but this number would have been higher but for discrimination thirty years ago, or but for preclusive practices in contracting trades that created barriers for minorities, then conceivably, the goal could be set at more than 1%. How much more depends on what conclusions are drawn concerning projected levels of minority participation in a particular industry absent past discrimination.

VI. The Impact of *Croson* and *Metro* Beyond the Context of Legislative Racial Classifications

A. IMPACT ON COURT-ORDERED RACIAL CLASSIFICATIONS

Court-ordered racial classifications involve "state action", and thus are subject to constitutional limits. In the wake of *Croson* and *Metro*, it is unclear what is the appropriate standard of constitutional review for such action.[73] Since federal courts are organs of the federal government, presumably the intermediate standard enunciated in *Metro* would apply. However, even after *Fullilove*, where a majority of the court declined to apply strict scrutiny to Congress, there was substantial debate as to whether the *Fullilove* rules applied to the federal courts.[74] This debate was played out in the two relevant cases: *Sheet Metal Workers* and *Paradise*.

Writing for a four Justice plurality in both of those cases, Justice Brennan advocated intermediate scrutiny as the appropriate standard of review. But Justice Brennan did not take this position because the cases involved federal courts. Rather, it simply reflected his view that affirmative action by *any* government body warrants that standard of review. In any event, Justice Brennan found no need to decide on the appropriate standard of review of court-ordered remedial racial classifications: In his view the orders at issue in both cases "survive[d] even strict scrutiny." *Paradise*, 480 U.S. at 167. *See also Sheet Metal Workers*, 478 U.S. at 480.

Justice Powell wrote separately in both cases stating his position that court-ordered remedial racial classifications should be subject to strict scrutiny, just like he said was appropriate for legislative classifications in *Bakke* and *Fullilove*. Even under that standard, however, Justice Powell found the court orders constitutional. *See Paradise*, 480 U.S. at 187 & n.2 (Powell, J., concurring); *Sheet Metal Workers*, 478 U.S. at 484-85 (Powell, J., concurring).

Every Justice in both *Paradise* and *Sheet Metal Workers* — including the dissenters — concluded that the court-ordered racial classifications at issue were predicated on a "compelling interest," because of the well-documented egregious discrimination and resistance of those on whom the orders were imposed.[75] In *Paradise*, however, the majority and dissenters disagreed on the degree of deference owed to a district judge's choice of means to remedy that discrimination. The specific dispute in *Paradise* centered on the question of the availability of race-neutral alternatives. The *Paradise* majority reasoned that, in light of the Alabama Highway Department's legacy of discrimination and obstinance in responding to previous court orders, the series of post-hoc alternative remedies proposed by the dissenters would not have worked.[76] For Justice O'Connor, however, if strict scrutiny had any meaning, alternatives to racial classifications should have been explored. *Paradise*, 480 U.S. at 199-200 (O'Connor, J., dissenting). Thus, what "disturbed" her most about the race-conscious order in *Paradise* was that "the District Court imposed the [remedy] *without consideration of any of the available alternatives.*" *Id.* at 200 (emphasis in original). By contrast, Justice O'Connor said, the district court in *Sheet Metal Workers* had at least "'considered the efficacy of alternative remedies' before imposing a racial quota." *Id.* (quoting *Sheet Metal Workers*, 478 U.S. at 481 (plurality opinion)).

Responding to Justice O'Connor, the plurality said reviewing courts must defer to a lower court's remedial orders when a constitutional violation was proven below. *Paradise*, 480 U.S. at 183 (plurality opinion). In this regard, the plurality remarked that the district judge in *Paradise* "ha[d] first hand experience with the parties and [was] best qualified to deal with the 'flinty, intracticable realities of the day to day imposition of constitutional commands.'" *Id.* at 184 (quoting *Swann v. Charlotte-Mecklenberg Board of Education*, 402 U.S. 1, 6 (1971)).[77] Therefore, although strict scrutiny requires race-conscious remedies to be narrowly tailored, "that requirement d[id] not operate to remove all discretion from the District Court in its construction of a remedial decree." *Paradise*, 480 U.S. at 185.[78]

Justice Stevens' *Paradise* concurrence was particularly emphatic on this point. He declared that a "District Court ha[s] broad and flexible authority to remedy the wrongs resulting from [a proven constitutional] violation." *Id.* at 189. Relying heavily on school desegregation cases in which the Court had given district courts wide latitude in remedying proven constitutional violations, Justice Stevens said that "[t]he notion that this Court should craft special and narrow rules for reviewing judicial decrees in race-discrimination cases [had been] soundly rejected." *Id.* at 191.

In his *Croson* concurrence, Justice Stevens sounded this theme again, claiming that "[i]t is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion [appropriate] remedies. Thus, in cases involving the review of judicial remedies imposed against persons who have been proved guilty of violations of law, I would allow the courts in racial discrimination cases the same broad discretion that chancellors enjoy in other areas of the law." *Croson*, 109 S. Ct. at 732 (Stevens, J., concurring).

Justice Stevens was, however, the only member of the *Croson* majority to raise the issue of the latitude of a district judge, and distinguish it from that of a legislature. For the other five Justices — four of whom had dissented in *Paradise* on the grounds that the district judge had allegedly abused his discretion — consideration of race-neutral alternatives would probably be imperative before a court could order race-conscious remedies. Justices Kennedy and Souter were not on the Court when *Paradise* was decided. It is highly probable, however, that at least one — if not both — would join Justice O'Connor and the other *Paradise* dissenters in requiring district judges, at minimum, to consider race-neutral remedies, and perhaps comply with the whole panapoly of the narrowly tailored factors.

B. IMPACT OF *CROSON* ON TITLE VII AND SECTION 1981 LIMITS ON AFFIRMATIVE ACTION

1. TITLE VII

Much of what we know as affirmative action takes place in the workplace of private employers, who are not state actors and thus are not subject to the Constitution. The affirmative action plans of private employers must, however, comply with Title VII of the 1964 Civil Rights Act.[79] The central question here is whether Title VII draws the same lines as the Constitution and thus subjects private employers and state actors to identical constraints when it comes to affirmative action.

In *Johnson*, five Justices stated that Title VII of the 1964 Civil Rights Act "was not intended to extend as far as . . . the Constitution." *Johnson*, 480 U.S. at 628 n.6. Nonetheless, the same basic two-step approach determines the validity of affirmative action under the Constitution and Title VII: (1) It must have a legitimate factual predicate, and (2) the means to its ends must be reasonable. As a practical matter, the second step does not vary with the nature of the challenge, because under Title VII, the Court has generally applied the same factors it applies in determining if a racial classification is "narrowly tailored" for constitutional purposes.[80]

Presently, the difference between the constitutional and statutory limits on remedial racial classification lies in the requisite factual predicate. Under the Court's current Title VII jurisprudence, the racial classifications of private employers' need only be predicated on a "manifest racial imbalance in traditionally segregated job categories."[81] In determining whether such an imbalance exists, an employer may compare the percentage of minorities (or women if the plan is gender-based) in the employer's work force with the percentage of minorities (or women) in the general population or, if the job requires special skills, with the number of qualified minorities in the relevant labor market. *Johnson*, 480 U.S. at 631-32.

Significantly, a "manifest imbalance" ***need not*** support a prima facie case of a Title VII violation by the employer. *Id.* at 632. Thus, an employer can institute a racial classification even if he or she had not previously discriminated.[82] In fact, there is no need under Title VII to show anybody's identified discrimination; an employer can predicate a racial classification on mere societal discrimination.[83] To be sure, in *Weber* there was evidence that somebody had discriminated, namely the craft unions from which the employer drew its labor pool.[84] In *Johnson*, however, the manifest imbalance that the Court found to exist was not tied to anybody's identified discrimination.[85]

The Court's rationale for permitting employers to adopt remedial racial classifications under Title VII on a showing of "manifest imbalance" is its belief that the statute is intended to encourage "voluntary employer [initiatives to] . . . eliminat[e] the effects of discrimination in the workplace." *Johnson*, 480 U.S. at 630. According to the Court, application of the prima facie standard would "thwart" voluntary efforts by forcing employers to "confess" their past misconduct, which, in turn, might subject them to lawsuits filed by those against whom they have admittedly discriminated. *Id.* As Justice Blackmun described it, the prima facie test would place an employer on a "tightrope" between "liability for past discrimination against blacks . . . and liability to whites for any voluntary preference adopted to mitigate the effects of prior discrimination against blacks." The only way then for the employer to "keep [its] footing [would be to] eschew all forms of voluntary affirmative action." *Weber*, 443 U.S. at 210 (Blackmun, J., concurring).

Justice Stevens' views are similar, but reflect his own "spin" on affirmative action: In *Johnson*, he declared that there is "no reason why [an] employer has any duty, prior to granting a preference to a qualified minority employee, to determine whether his past conduct might constitute an arguable violation of Title VII." *Johnson*, 480 U.S. at 646 (Stevens, J., concurring). But Justice Stevens considered this an element of his general "forward looking" approach to affirmative action. *Id.* at 647. In particular, Justice Stevens said that employers should be allowed to "focus on the future" and predicate racial classifications on non-remedial grounds. *Id.* at 646. Justice Stevens was the only member of the Court in *Johnson* to articulate that vision of affirmative action under Title VII. And even after *Metro*, it is uncertain whether a majority of the Court would allow private employers to act on the basis of race to promote the non-remedial objective of fostering diversity in the workplace.[86]

The most significant vote in Johnson was Justice O'Connor's. She concurred in the judgment, but wrote that, under Title VII, a remedial racial classification can be justified only if "the employer could point to evidence sufficient to establish a firm basis for believing that remedial action is required . . . [A] statistical imbalance sufficient for a Title VII prima facie case against the employer would satisfy this firm basis test."[87] In making this point, Justice O'Connor remarked that there is "little justification for the adoption of different standards for affirmative action under Title VII and the equal protection clause." *Johnson*, 480 U.S. at 652 (O'Connor, J., concurring).

After *Croson*, the Constitution apparently requires prima facie evidence of identified discrimination as the predicate for state and local remedial racial classification. Indeed, Justice O'Connor said as much in *Croson*. That view may now carry over to Title VII. For if Justice O'Connor's view that the constitutional and statutory limits on remedial racial classifications should be the same garners the support of a majority of the Court, then the prima facie standard would also presumably apply under Title VII.[88]

That result is more likely now, because Justices Kennedy and Souter have replaced Justice Powell and Brennan, both of whom had favored the "manifest imbalance" standard as the requisite Title VII requirement. In fact, Justice Kennedy agreed with Justice O'Connor in *Croson* that the Constitution requires racial classifications to be predicated on prima facie evidence of discrimination. It is probable that Justice Kennedy will also follow Justice O'Connor's opinion in *Johnson* and opt for the prima facie requirement under Title VII.[89] Furthermore, he could even go with Justice Scalia and vote to overrule *Weber*. Either way, the *Croson* ground rules may soon apply in the Title VII context.[90]

2. SECTION 1981

Private employers must also comply with 42 U.S.C. § 1981, which bars racial discrimination in the "making and enforcement of contracts." Indeed, Section 1981 applies to all employers, including those who are not covered by Title VII. In the employment context, the main thrust of the statute is to prohibit discrimination in hiring. *See Patterson v. McLean Credit Union*, 109 S. Ct. 2363 (1989).

The Court has held that, like Title VII, Section 1981 prohibits discrimination against whites on the basis of their race. *See McDonald v. Santa Fe Trail Transportation Co.*, 427 U.S. 273 (1976). But it has never decided whether the statute prohibits discrimination against whites pursuant to affirmative action plan that would satisfy the Title VII standards of *Weber* and *Johnson*. This question is potentially a crucial one for private employers, because Title VII and Section 1981 do not always impose parallel restrictions.[91] In fact, in crucial respects, the standards of liability under Section 1981 are identical to those of the Constitution. For example, to prevail under Section 1981, a plaintiff must prove intentional discrimination; disparate impact is not enough.[92] The Court could therefore conceivably apply the *Croson* constitutional ground rules in the context of a Section 1981 challenge to affirmative action.[93] Indeed, numerous suits challenging affirmative action programs have raised Section 1981 claims, as well as constitutional claims. For example, the plaintiffs did just that in *Krupa v. New Castle County* — a post-*Croson* case. But the court was able to avoid the question of whether Section 1981 prohibits affirmative action because the challenged race-based decision involved promotions, which the statute apparently does not cover under the rule articulated in *Patterson*. *See Krupa*, 732 F. Supp. at 520.

VII. Conclusion

Croson and *Metro* represent a watershed in the law of affirmative action. In these two decisions, the Supreme Court has set forth the general constitutional rules governing the use of race to benefit minorities. In coming years, we will see how these rules play out in practice: how governments—and perhaps even private employers—adjust and recraft affirmative action programs, and how an increasingly conservative federal bench responds. It promises to be a particularly challenging time for advocates of affirmative action.

Chapter XVI

Voting Rights Enforcement in the Bush Administration: The First Two Years

by Frank R. Parker

I. Justice Department Voting Rights Responsibilities

Voting rights policies play a critical role in any civil rights enforcement program. Full protection for the right to vote is fundamental, not only because the right to vote is intrinsically important, but also because the right to vote and participate in the democratic process is protective of all other rights. In a country founded on the principle that taxation without representation is wrong, the right to vote also incorporates the right of voters to be free of electoral systems that deny them an equal opportunity to gain representation of their choice.

The Justice Department's principal voting rights enforcement responsibilities derive from Sections 2 and 5 of the Voting Rights Act of 1965.[1] Under Section 2 the Department has the responsibility for bringing lawsuits to eliminate voting practices and methods of election that have a racially discriminatory result. Under Section 5 the Department has the duty to review voting law changes submitted by covered states for Justice Department preclearance, to object to changes when the state or locality fails to show that they do not have a racially discriminatory purpose or effect, and to file lawsuits to block implementation of unprecleared or objected to changes.[2]

In addition, the Department is responsible for dispatching federal examiners (registrars) and observers (poll watchers) to covered states when needed; defending bailout suits brought by covered states and localities seeking to exempt themselves from the Section 5 preclearance provision; and enforcing the bilingual voter registration and election requirements for non-English-speaking voters. The Department also is responsible for enforcing the Uniformed and Overseas Citizens Absentee Voting Act which provides procedures for absentee voting in federal elections for uniformed and overseas citizens.

II. The Reagan Administration Record

In my chapter *Voting Rights Enforcement in the Reagan Administration* contained in the 1989 Report of the Citizens' Commission on Civil Rights, *One Nation, Indivisible*, I analyzed the Reagan Administration's poor record of Voting Rights Act enforcement.[3] I found that despite paying lip service to voting rights, the Reagan Administration opposed every major effort to strengthen voting rights protections and in enforcing the Voting Rights Act in significant instances took positions that undermined voting rights guarantees.

With Assistant Attorney General William Bradford Reynolds taking the lead, the Reagan Administration opposed the 1982 amendment to Section 2 of the Voting Rights Act that eliminated the requirement of proving discriminatory intent. Section 2 is the nationwide statutory prohibition against any voting or election practice that has a racially discriminatory result. After the amendment passed, the Reagan Administration failed to vigorously enforce its new provisions; allowed political meddling to undermine effective enforcement; frequently sided with Southern states resisting implementation of the Voting Rights Act, most notably in *Thornburg v. Gingles*, the landmark Supreme Court case that simplified proof of a Section 2 violation; and opposed effective remedies even after a violation had been found.[4]

The Reagan Administration also in significant instances attempted to undermine enforcement of Section 5 of the Act. Section 5, the federal preclearance requirement, is the first line of defense against discriminatory voting law changes in the South and the Southwest. Section 5 requires nine covered states and parts of seven others to prove to the Justice Department (or D.C. District Court) that any new voting law change is nondiscriminatory in purpose and effect. If the Justice Department objects to the change, that change cannot be implemented unless the covered jurisdiction obtains the approval of the D.C. District Court.

Despite important Section 5 objections after the 1980 Census, overall during the first seven years of the Reagan Administration the rate of Justice Department Section 5 objections substantially declined to one-third the rate of prior administrations. In addition, Reynolds, despite staff recommendations, approved racially discriminatory voting law changes that later were struck down by the courts; precleared voting law changes that had been blocked by prior administrations; adopted unduly restrictive interpretations of what types of changes were covered by Section 5 and under what circumstances a change has been precleared; precleared discriminatory annexations under a rule permitting *de* *minimis* discrimination; and precleared discriminatory features of submitted changes but then sued the jurisdiction to block implementation of the approved change.[5]

Further, Reynolds attempted to flaunt the will of Congress—expressed when Congress amended the Act in 1982—by announcing that voting law changes submitted for preclearance under Section 5 would not be judged for discrimination under the new Section 2 "results" test. Reynolds retreated from this indefensible position only after an outcry from key members of Congress and civil rights groups.[6]

In light of these defaults, I made a number of recommendations to expand voting rights protections and to provide for more vigorous enforcement. I recommended that the Bush Administration should (1) support the Universal Voter Registration Bill designed to remove existing barriers to voter registration; (2) increase the number of Section 2 lawsuits; (3) advocate more effective remedies, such as 65 percent minority districts and remedial plans with single-member districts only, once a violation had been found; (4) revise its Section 5 regulations to make it clear that the Department will object to any plan which has a racially discriminatory result; (5) object under Section 5 to any plan that has even a slight discriminatory effect; (6) more closely monitor election day assistance to illiterate voters to insure that they are able to receive assistance from any person of their choice; (7) obtain the necessary computer and other technical capabilities to analyze new plans after the 1990 Census; (8) institute criminal prosecutions, particularly for repeated violations of the Act; and (9) more vigorously advocate injunctions against any further at-large elections, once courts have found that at-large elections violate the Voting Rights Act.[7]

III. Bush Administration Voting Rights Policies

Upon taking office, Attorney General Richard Thornburgh repeatedly stated that the Bush Administration Justice Department was determined not to repeat the mistakes of the past eight years in the area of civil rights enforcement. John R. Dunne, Thornburgh's appointee to head the Civil Rights Division, appears to be sincerely interested in vigorously enforcing the Voting Rights Act and has said so on numerous occasions. He has reached out to civil rights organizations and listened to their views, made numerous public appearances before a variety of different groups at which he has pledged strong Voting Rights Act enforcement,[8] personally argued the important Texas at-large judicial elections case before the *en banc* Fifth Circuit,[9] and filed briefs in a number of important cases supporting the discrimination claims of minority voters.[10]

Nonetheless, there have been several significant lapses which must be corrected if the Bush Administration is to make good on its commitment to strong voting rights enforcement. These include the Justice Department's early opposition to the National Voter Registration Bill (discussed in another chapter), its Supreme Court brief in *Sanchez v. Bond* opposing Supreme Court review of a Tenth Circuit decision upholding at-large elections that discriminated against Hispanic voters, and its failure in significant instances quickly to initiate lawsuits to enjoin implementation of voting law changes to which it has objected under Section 5 of the Voting Rights Act.

A. SECTION 2 ENFORCEMENT

The Department appears to be making good on its promise to vigorously enforce Section 2 of the Voting Rights Act, the national prohibition on discriminatory voting practices. The Department has filed and prosecuted a number of important high-profile lawsuits, including *United States v. Georgia*,[11] the lawsuit challenging Georgia's majority vote/runoff requirement, and *United States v. County of Los Angeles*[12] (filed during the prior administration but tried in 1990), the lawsuit challenging racial gerrymandering against Hispanics in county supervisors' redistricting in Los Angeles County.

The Justice Department's lawsuit against the Georgia majority vote requirement is the first such lawsuit filed by the Department (prior to the Department's lawsuit, a private lawsuit challenging Georgia's majority vote requirement had been filed by black voters). In many parts of the South a majority vote requirement for party nomination or election (Georgia requires a majority for both) has had a discriminatory impact. Frequently, a black candidate will receive the most votes in a multi-candidate field. But, if the black candidate fails to win a majority, there must be a run-off election between the candidate who receives the most votes and the candidate with the next highest number of votes, often a white candidate. In white majority districts, white voters usually bloc vote for the white candidate in the run-off election, resulting in the black candidate's defeat.[13]

The *United States v. County of Los Angeles* case, in which the Department joined with Hispanic voter plaintiffs challenging the county redistricting plan, was probably the Department's biggest and most expensive voting rights case ever filed. The case cost the Department over $2 million. The three-month trial required an enormous expenditure of effort and money by the Department; 16 expert witnesses testified for plaintiffs and defendants, more than in any other voting rights case. The district court ruled that the challenged redistricting plan was racially discriminatory against Hispanic voters in intent and effect and ordered the adoption of a new plan with a majority Hispanic district.[14] The U.S. Court of Appeals for the Ninth Circuit affirmed the district court's decision on the basis of its findings of discriminatory intent, and the Supreme Court both refused to stay implementation of the new remedial plan and declined to review the Ninth Circuit's decision.[15]

This case was very important for Hispanic voters. Los Angeles County, with over 7 million inhabitants, is the largest county in the country and has more population than 42 states. The new plan gives the county's more than 2 million Hispanic residents the opportunity for the first time to elect a Hispanic candidate to the county board of supervisors, the county governing board.

In addition to these lawsuits filed by the Department, the Department also has supported claims of voting discrimination in cases filed by private plaintiffs challenging the at-large election of state court judges, most notably in *LULAC v. Clements*, a Texas lawsuit. Lawsuits challenging at-large state judicial elections are a relatively new development in voting rights law. State judiciaries are one of the last bastions of political segregation. At-large judicial elections generally make it difficult for minority voters to elect candidates of their choice, with the result that even in states with high minority concentrations almost all state court judges are white or Anglo. For these reasons, federal district courts in three Southern states, Mississippi, Texas, and Louisiana, have struck down at-large judicial elections for violating Section 2 of the Voting Rights Act.[16]

In *LULAC v. Clements* the U.S. District Court in Texas made strong findings that at-large judicial elections discriminated against Hispanic and black voters in a number of Texas judicial districts.[17] Despite these findings of discrimination, a panel of the U.S. Court of Appeals for the Fifth Circuit reversed, ruling that methods of election for state court trial judges are not covered by the anti-discrimination prohibitions of Section 2.[18]

The Justice Department filed briefs in support of the minority voter plaintiffs in this case, and when the case was reheard *en banc* by the Fifth Circuit, Dunne personally appeared before the court of appeals and argued the Department's position that Section 2 covers at-large judicial elections. In spite of a general judicial policy of deferring to the Justice Department on interpretations of the scope of federal voting rights legislation, the full Fifth Circuit, by a vote of 12 to 1, rejected the Department's position and ruled once again that Section 2 does not cover discriminatory judicial elections.[19] The Fifth Circuit's ruling also resulted in court orders dismissing two pending judicial elections cases in Louisiana.[20] On January 18, 1991, the Supreme Court agreed to review the Fifth Circuit's decisions in the *LULAC* case and in *Chisom v. Roemer*, one of the Louisiana cases, but as of this writing had not yet rendered a decision on the merits.

In preliminary briefs filed in the Supreme Court, the Justice Department maintained its position that at-large judicial elections are covered by Section 2. In *Chisom v. Roemer*, in which the Justice Department was a party, the Department filed a petition for a writ of certiorari contending that the Fifth Circuit's *en banc* ruling in *LULAC* is "contrary to the broad remedial purposes underlying the 1982 amendments to Section 2."[21]

The Department also has supported the discrimination claims of minority voters in other cases in the Supreme Court.[22] In two important Supreme Court cases, *City of Norfolk v. Collins* (No. 89-989) and *Liberty County, Florida v. Solomon* (No. 90-102), the Department filed briefs recommending that the Supreme Court decline to review court of appeals' decisions favorable to minority voters' claims of vote dilution. The plaintiffs in *Collins* had won a Fourth Circuit ruling striking down at-large city council elections in Norfolk, Virginia for diluting black votes, and the city sought review of that decision in the Supreme Court.[23] In *Liberty County* the Eleventh Circuit had reversed a district court decision upholding at-large county elections and remanded for further findings on plaintiffs' discrimination claims, and the county sought Supreme Court review.[24] In both cases, the Supreme Court denied certiorari.

In addition, the Department filed a brief supporting discrimination claims in the Arkansas legislative redistricting case, *Clinton v. Jeffers* (No. 89-2008), recommending Supreme Court affirmance without oral argument of a three-judge district court decision favorable to minority voters. The district court struck down the state's 1981 legislative reapportionment plan for gerrymandering black voting strength and adopted a new plan that created seven new majority black House districts and two new majority black Senate districts.[25] The Supreme Court summarily affirmed the district court's decision, establishing an important precedent for applying the Section 2 legal standards, which courts have applied in at-large election cases to challenges to discriminatory redistricting as well.[26]

Nonetheless, there has been one significant lapse from the Department's commitment to minority voting rights. In *Sanchez v. Bond* (No. 89-353), the U.S. Court of Appeals for the Tenth Circuit rejected Hispanic voters' claims that at-large county elections diluted their voting strength.[27] Despite uncontradicted statistical evidence of racial bloc voting by Anglos that resulted in the defeat of all Hispanic candidates, the Tenth Circuit ruled that vote dilution had not been proven because some Anglos allegedly supported by Hispanic voters had won election, and because one lay witness for defendants gave anecdotal testimony that Hispanic voters were not politically cohesive. The Tenth Circuit's reasoning substantially deviated from the standards set forth by the Supreme Court in *Thornburg v. Gingles*, the controlling authority, and other cases.[28]

The Hispanic voter plaintiffs then sought review of the Tenth Circuit's decision in the Supreme Court, and the Supreme Court asked for the Justice Department's views. Although the Department in its brief admitted that the lower courts' decisions were "opaque" and "problematic," it nonetheless recommended that the Supreme Court not take the case because the issues were not sufficiently important for Supreme Court review.[29] Subsequently, the Supreme Court denied certiorari, leaving standing the adverse Tenth Circuit precedent.[30]

The Justice Department's brief in *Sanchez v. Bond* was troubling because, by supporting defendants' arguments, the

Department's position was reminiscent of Department policies of the prior eight years and raised the issue of whether minority voters would be able to rely on the Justice Department fully to protect their voting rights in the 1990s. The *Sanchez* brief seemed to reflect the continuing legacy of Brad Reynolds' tenure.[31] However, it is important to note that the brief was filed during Assistant Attorney General John R. Dunne's first month on the job, and for that reason may not reflect his mature thinking on voting rights issues. Further, the Department's subsequent Supreme Court briefs, in *City of Norfolk v. Collins, Liberty County v. Solomon, Clinton v. Jeffers, United States v. County of Los Angeles*, and *Chisom v. Roemer*, while not all of them were totally uncritical of the pro-voting rights rulings of the appeals courts, overall were more sympathetic to minority voters' discrimination claims. Hopefully, the *Sanchez* brief was an abberation and does not reflect current Justice Department policy on voting rights issues.

B. SECTION 5 ENFORCEMENT

The Department's record for Section 5 enforcement appears to have improved. In 1990 the Department lodged high-profile Section 5 objections to new laws creating at-large judicial elections in Georgia, Louisiana, and Texas.[32]

The Georgia submission involved state statutes creating new superior court judgeships going back to 1967 and encompassed 30 of the state's 45 superior court circuits. All of the superior court judges were elected at-large. In his Section 5 objection letter, Dunne noted that the election system requires a majority vote in both the primary and general elections, and candidates must run for a designated post, which precludes single-shot voting, all making it very difficult for black candidates to get elected. In elections held under this system, incumbents almost always win. Dunne also found that in the Atlanta Circuit, in which most of the black candidates have run, voting is racially polarized, no black candidate has ever defeated a white incumbent, and, while five black judges have been elected in Atlanta, they were never opposed. Although the Atlanta Circuit is 51 percent black, only three of the eleven superior court judges are black. Outside Atlanta, only three blacks have served as superior court judges, and all of them were initially appointed to fill vacancies.[33]

On these facts, Dunne concluded that the state had not met its burden of proving that these new judgeships met the Section 5 preclearance standards, declined to withdraw the Department's 1989 objection to 48 new judgeships, and objected to ten new judgeships created in 1989 and 1990.[34] The Louisiana and Texas objection letters also objected to the creation of new judgeships elected in at-large voting with electoral mechanisms that made it difficult for black candidates to win elections.

Two other factors indicate improvements in the Department's enforcement of Section 5. There have been fewer complaints from civil rights organizations that objectionable changes are being approved. Further, to my knowledge, for the past two years there has been no instance in which a voting law change approved by the Justice Department has been struck down by the courts as racially discriminatory.

What problems remain in Section 5 enforcement are not necessarily endemic to this administration. Ball, Krane, and Lauth in their book, *Compromised Compliance*, based largely on an analysis of Nixon and Carter Administration policies, have pointed out that the Department has been weak on following up Section 5 objections[35] and has been reluctant to file lawsuits to enforce Section 5 objections:

> Going to court is not an easy decision. As long as the CRD [Civil Rights Division] can keep negotiations, even if strained, moving ahead, it retains control over the conflict's outcome. Leaving its bureaucratic bailiwick means surrendering some degree of influence to the vagaries of the judicial process. After all, some federal judges in southern districts still oppose federal intervention into local electoral affairs. Because the movement to litigation transforms the agency's relationship with the covered jurisdiction from cooperation to confrontation, the step-up in coercion is not taken lightly by the CRD leadership.[36]

As a result, the initiative for enforcing of Justice Department Section 5 objections remains largely in the hands of private litigants. During the past two years private litigants in several instances have had to file lawsuits and motions for injunctions to block implementation of new voting laws which either had never been submitted for Section 5 preclearance or to which the Justice Department had objected.[37] The Justice Department, to its credit, generally has supported these private initiatives either by filing companion lawsuits or by filing friend of the court briefs on plaintiffs' side. But private litigants generally have had to shoulder the burden and expense of initiating these lawsuits and motions for injunctive relief.

The issue of blocking implementation of objected-to changes has become critical in light of the increasing tendency of recently-appointed federal judges in the South to disregard the Voting Rights Act's prohibitions and refuse to enforce Justice Department Section 5 objections. In three recent cases, two from Louisiana, *Clark v. Roemer* and *Hunter v. City of Monroe*, and one from Texas, *Mexican American Bar Association of Texas v. Texas*, three-judge federal district courts refused to enjoin elections or the swearing in of winning candidates for newly-created judicial positions to which the Justice Department had objected under Section 5.[38] The Supreme Court issued an injunction pending appeal in *Clark v. Roemer* enjoining new elections for the objected-to judicial posts, but refused to grant an injunction in *Hunter v. City of Monroe*, apparently because the elections already had taken place.[39]

To prevent the implementation of election changes to which the Justice Department has objected, the Department should initiate a program of exacting written, signed pledges from submitting jurisdictions that they will not attempt to implement unprecleared or objected-to changes. Absent such assurances, the Department should be more aggressive in uncovering unprecleared changes and in filing Section 5 enforcement actions to block unprecleared or objected-to voting law changes.

IV. Conclusion

Overall, there appears to be a marked improvement in Voting Rights Act enforcement under the Bush Administration. The Department has been more visible and aggressive in filing and prosecuting Section 2 lawsuits against discriminatory election practices, in supporting private lawsuits challenging discriminatory voting practices, and in lodging a number of important Section 5 objections to discriminatory voting law changes in covered states.

However, contrary to the Attorney General's assurances, the Department appears in some instances to have repeated some of the mistakes of the prior administration. The Department's early and premature opposition to the national voter registration bill is reminiscent of the Reagan Administration's opposition to amendments strengthening the Voting Rights Act in 1982. Hopefully, the Department will reconsider its position when the bill is reintroduced in Congress. The Department's brief recommending that the Supreme Court decline to review the Tenth Circuit's decision in *Sanchez v. Bond*, while not a brief on the merits of the case, raises troubling questions regarding the Department's commitment to vigorous Voting Rights Act enforcement. The Department's failure to be more aggressive in taking the initiative to block implementation of unprecleared and objected-to voting law changes remains a continuing problem which the Department should address.

Nonetheless, the Department's opposition to the voter registration bill and its *Sanchez* filing occurred early in the Administration, before Assistant Attorney General John Dunne gained full control of Civil Rights Division policies. Dunne appears sincerely interested in vigorous voting rights enforcement, and civil rights groups fully expect him to make good on that commitment.

Chapter XVII

Voter Registration Reform: Eliminating Discriminatory Registration Barriers

by Marsha Nye Adler

I. Introduction

Immediately before the 1990 general election, the *New York Times* surveyed adults nationwide in order to create a profile of nonvoters. As other past research has found, nonvoters tend to be younger, more mobile, less likely to have attended college, and more apt to have incomes under $30,000. The other characteristic is that nonvoters, while not feeling strongly partisan, tend to be fairly equally divided in their preference for Republican and Democratic candidates. These are also characteristics of Americans who are not registered to vote.

For the past thirty years, the turnout rate has moved steadily downward, with 1990 turnout sinking to about 36 percent of the eligible population. Nearly twice the number of potential voters passed up their right to vote than cast their ballots.

What's the reason for the decline in participation? And what's the reason for so many Americans letting the election pass them by?

In survey after survey in the past several elections, the reason that most people have offered for not going to the polls is that they are not registered to vote. Seventy million Americans fit into that category, more than a third of the eligible voter pool.

Scholars, pundits, reporters and a host of others have attempted to determine the reason for the decline in participation among Americans. They cite factors from anomie to disgust, complacency to agitation with the system, negative campaigns to the lack of interesting candidates as the "cause" of low voter involvement. In our complex society and its complicated political structure, any or all of these factors may be operating in different political arenas. Additionally, while any of these factors may have a negative impact on participation, they defy political or legislative remedies that can be applied to turn the trend line upward.

We do know, however, that there is one factor that obviously contributes to a low voter turnout, and that is the rate of registration of eligible voters.

II. Voter Registration as a Factor in Decline of Turnout

In half the states, voters must register in person at voter registration sites, at appointed hours and days, and as much as 30 days before an election. In other states, some measures have been implemented to make it easier for voters to register, such as mail-in registration, agency-based registration, including "motor voter"—registering at drivers license facilities—and election day voting. In states that have eased registration by these means (the more reform, the higher the change), registration *and turnout* have increased, or at least declined at a slower rate than states with no reform programs.

By far the most effective method of registration in the past several years has been agency-based. The ideal agency-based program includes active staff involvement in the registration process, using an integrated application form. The most widespread use of this method is a program administered by motor vehicle departments, dubbed "motor voter." While the method of registration varies from state to state, motor voter programs include on either the drivers license application form or in the questionnaire on the computer a section that allows the drivers license applicant to register to vote. The most effective programs, such as those in Minnesota and the District of Columbia, involve the staff in asking the applicant if he or she wants to register to vote and assisting the applicant in filling out the registration information.

The District of Columbia set a new turnout record in 1990, surpassing the presidential election of 1988, after raising its voter registration by twenty-six percent since 1986. More than 75 percent of the new registrations came from the District's newly implemented motor voter program. Emmett Fremaux, Washington's Elections Board Director, stated recently that "the fact that a new record has been set in a non-presidential year indicates that a fundamental increase in voter registration has occurred in the District."

The connection between registration and turnout is obviously strong, since in all states but North Dakota, citizens must register in order to vote. The percentage of registered voters who actually vote is high—86 percent of registered voters voted in 1988. If turnout of registered voters is so high, and turnout in general is so low, then logic tells us that registration is the key to raising turnout—as several jurisdictions found in 1990.

Besides the District of Columbia, several states that aggressively had undertaken improvements in their registration systems increased turnout dramatically. Nevada, near the bottom of states in participation in 1986, registered 54,000 new voters in 1990 through its motor voter program instituted in 1989, and increased turnout by two percent in an election with no statewide races.

North Carolina, which has had a motor voter program on the books for several years, began in earnest to implement the process in late 1989. Between January and August of 1990, North Carolina had registered 84,000 voters, increasing registration and raising turnout from 1986 by *twenty* percent.

Minnesota's election system is the most progressive in the country, and as a result, the state has the highest registration and turnout of any state. The combination of election day, motor voter, agency-based and mail-in registration has assured Minnesota nearly 90 percent registration and an increase in turnout from 1986 of 16 percent.

Another election-day registration state, Maine, increased its turnout between 1986 and the 1990 election by thirteen percent by adding a motor voter program to its election system.

III. Congressional Action on Voter Registration

In February, 1990, the U. S. House of Representatives, by a margin of 289-132, passed legislation that would require states to institute programs to expand voter registration. These programs would include motor voter, agency-based, and mail-in registration. The bill also included a program that would guarantee that cleaning voter rolls would be conducted in a nondiscriminatory manner. The Senate considered its version of the legislation in September of last year, but in end-of- Congress maneuvering, was blocked from consideration by a vote that fell five short of the sixty votes needed for cloture.

While the White House indicated that voter registration reform legislation was problematical, and that certain features of the bill were unacceptable, the Bush Administration never threatened a veto. There was speculation that the White House was behind the Senate Republican refusal to allow the Senate bill to come to the floor, and that the White House may play a similar role in the 102nd Congress.

On January 23, 1991, Senate sponsors introduced a revised bill, S. 250, the National Voter Registration Act, and pledged their efforts to move the bill in the first months of the session. Hearings have been scheduled for March by the Rules Committee. In the hearings, Chairman Wendell Ford (D-KY) intends to consider possible amendments and review recent research on voter registration.

The prospects for Senate passage seem brighter this year since Senator Mark Hatfield (R-OR) signed on as an original cosponsor of S. 250, and other Republicans are expected to join him in sponsoring the bill. In the 101st Congress, the voter registration reform bill had no Republican cosponsors and meager Republican support.

A House bill, similar to legislation that passed last year, is expected to be introduced in March or April. Rep. John Conyers (D-MI) may also offer his own version of reform legislation, which would include election-day registration.

In 1987, the Citizens' Commission on Civil Rights issued a report, "Barriers to Registration and Voting: An Agenda for Reform," that documented the historic and current barriers to voting, and made recommendations for legislation and citizen action to remove impediments to registration and voting. Many of those recommendations are contained in the registration proposals now before the House and Senate.

IV. What National Voter Registration Reform Legislation Does

While there are some differences in the approach the House and Senate have taken regarding a national voter registration reform bill, the provisions are nearly identical. They include the following:

1. Automatic voter registration when applying for a drivers license or a photo identification card. Currently 13 states have some form of "motor voter" registration. The federal legislation is modeled on the most effective and efficient programs, and adds an "automatic" feature—that the applicant is registered to vote unless he or she declines.

2. Agency-based registration. Registration forms must be widely available and government offices, including public schools, libraries, unemployment, vocational rehabilitation and welfare offices, must provide assistance in completing the forms.

3. Registration by mail. In the federal legislation, mail registration, now available in half of the states, must be on a form that is made available for public and private sector distribution. No notarization may be required, and a federal form may be used that states will be required to accept.

4. Prohibition on all purging for nonvoting. Currently, all but eight states automatically cancel registration for failure to vote. All but six of the remaining 41 states cancel for failure to vote in a period of four years or less. Thus, even if an individual is still eligible to vote and resides at the same address he or she will be removed from the voting rolls. Almost half of the states that purge for nonvoting require the voter to reregister without providing the forms; many states do not notify the voter of the purge.

5. Other provisions. While House and Senate legislation allows for cleaning of lists when it is conducted in a uniform and non-discriminatory manner, voters cannot be removed unless they have died or moved, or if they become ineligible for other reasons. The legislation also prohibits list cleaning within 60 days of a federal election. Both political parties, as well as organizations that engage in voter registration, want clean lists, and there is widespread support for this provision. There remain some questions about the *method* of notification of voters who appear to have moved, and protection of voters who inadvertently have been removed from the rolls. Congressional leaders are working to achieve consensus on the most effective list cleaning mechanisms, with the greatest protections for voters, and plan to make those procedures part of the bills introduced in the 102nd Congress.

The legislation also will include strong penalties to prevent harassment of voter registrants and reduce fraud, and enforcement provisions that include recovery of attorneys' fees and costs.

V. Issues in Congressional Support of Registration Reform Legislation

A. FRAUD

In past years, when voter registration reform was proposed, the most potent argument against change was that opening the system also creates the opportunity for election fraud. Studies have shown, however, that states that have instituted reform programs have not suffered increased fraud by voters or election officials. For example, the specter of thousands of unqualified voters descending on the polls and changing the outcome of elections has been raised by anti-immigration groups to turn back reforms like election day voter registration. Yet in the three states that have instituted election day registration—Minnesota, Maine and Wisconsin—there has been no increase in voter fraud.

Agency-based registration, the most effective registration method, is also least vulnerable to fraud, because registering agencies (motor vehicle, welfare and unemployment) require extensive documentation to support applications for licenses or benefits.

When the issue of fraud is discussed, certain cities, like Chicago, are mentioned. But Chicago and the state of Illinois, famous for election irregularities, have election systems of the old style that political parties and election officials have shaped and manipulated to achieve their own ends.

In the federal legislation, moreover, stiff penalties are imposed on individuals, including election officials, who are found to commit voter fraud.

B. COST

State and local election officials are understandably worried about the cost of instituting registration reforms, but recent research on states that have instituted motor voter and other reforms have found that the new programs are inexpensive to administer. For states with statewide computerization in motor vehicle and other offices, the cost is minimal. Forms may have to be redesigned to include additional information for registration purposes, and systems to transfer the information from motor vehicle and other agencies to voter registration offices may have to be created, but there is little cost impact on the agencies. Washington State estimates that the cost of its fully computerized system will cost only fifty cents for each new registrant.

Agency-based and mail-in registration do not have to be done by computer. Several states, including Minnesota, Nevada, Colorado, and the District of Columbia, do not use computerized systems to execute their highly effective motor voter programs. Minnesota estimates that the cost for its program is 35 cents a transaction. The District of Columbia's estimated cost for motor voter registration is three cents per voter.

Congressional sponsors of voter registration reform legislation are considering ways to defray costs of the federal program through grant programs and postal rate savings.

C. STATES RIGHTS

Opponents of federal legislation mandating voter registration reform often fall back on the argument that elections and registration are traditionally state functions, and that Congress should not legislate in this area. Under the Voting Rights Act and other legislation, however, Congress has been given the right to regulate in areas where there is a clear national interest, and especially where there is a differential impact on groups in the populations, particularly on minorities. This right obviously applies in the case of voter registration.

VI. The Case for Passage of Voter Registration Reform Legislation

A. DISCRIMINATORY IMPACT

Current voter registration practices in most states have the effect of discriminating against certain groups of potential voters—those who move often, students, disabled and elderly people—by requiring them to register in person at offices with restricted hours. Even states with mail registration often require additional activity—such as notarizing the application—that add to the difficulty of registering.

In many cases, registration outreach in these states is left to volunteer groups, whose activities are tied to the amount of funding they receive from foundations and other sources. In recent years, money available for voter registration drives by independent groups has declined significantly, adding to the growing number of citizens not registered to vote.

Among those most disadvantaged by the current system of voter registration are minorities. In 1988, 3.4 percent fewer African Americans were registered to vote than whites; Hispanics registration was 32.4 percent lower than whites. Disabled citizens and poor urban dwellers are especially hurt by current practices. Young people 18 to 24 years old, as a group, have the lowest voter registration rate and will gain the most from reforms.

A voter registration system that incorporates the features of the federal bills will include the widest range and numbers of voters by making registration accessible to *all* eligible voters. Motor voter will reach as many as 91 percent of the population who have drivers licenses or personal identification cards issued through DMV offices. Other eligible voters would be reached, nearly automatically, through registration at welfare, employment vocational rehabilitation and other offices. Mail-in registration would "catch" those voters who were not registered by other means.

B. PURGING

An important factor in lower registration rates is the necessity for voters to reregister if they have not voted for a period of time, or to change their addresses in order to remain eligible to vote if they have moved. States vary in their practices of removing voters from the rolls—in the reasons for removal and the period of time that the names are carried on the books. Some states clean the voter rolls as frequently as two years (Illinois canvasses its voters every six months); some states purge voters only every ten years. Clearly, the more often the purge, the more likely a person will be dropped from the rolls, especially if the purge is based on failure to vote. A purging system is open to error, and in every election a substantial number of voters are dropped from the eligible pool of voters erroneously, and as a result many are barred from voting. Motor voter, agency based or mail-in registration systems would allow constant updating of registration and residence, thus keeping a much larger number of voters on the rolls. Coupled with reciprocity among voter jurisdictions, these systems could eliminate voters erroneously dropped from the rolls. More importantly, these systems could cut significantly the cost of conducting purges.

Several civil rights organizations have objected to inclusion of purging or list cleaning mechanisms in any voter registration legislation. Their concerns are based on decades of negative experiences with registrars and election officials who see their roles as keeping minorities from voting, not adding them to the electorate. Because the purge or list cleaning is designed specifically to remove voters from the rolls, these civil rights groups see an open door to abuses.

Through these groups' efforts, the original purge provisions, added to gain support of Republicans and conservative Democrats, have been improved considerably. Yet, for these organizations, questions still remain. They are most concerned about the treatment of voters who may inadvertently be dropped from the rolls and arrive to vote on election day, and they continue to believe that without certain changes, the National Voter Registration Act may threaten the voting rights of some Americans.

Chairman Ford will hear testimony of these and other problems that organizations perceive with the bill in the Rules Committee's March hearings. House leaders are attempting to reach an accord among the bill's sponsors and its critics before the legislation is introduced.

Support of voter registration legislation has grown as the urgency of reform and the possibility of passage has increased. "Good government" groups from the League of Women Voters to Common Cause and HumanSERVE, civil liberties organizations such as People for the American Way and the American Civil Liberties Union, minority, disabled, and women's groups have been joined by activist religious organizations, unions, student groups and education associations in endorsing federal registration legislation.

Opposition, where it exists, comes from local election officials, although the National Association of Secretaries of State and the U. S. Council of Mayors support strong reforms. Some far right organizations continue to urge defeat of federal legislation.

VII. Conclusion

Pending legislation is likely to have a significant impact in reducing discrimination in registration activities and in encouraging greater citizen participation in democracy. Without the elimination of barriers to voter registration, the full promise of the Voting Rights Act will not be met.

Chapter XVIII
The 1990 Census: Undercounting and Redistricting

by Cynthia D. Hill, with assistance from Alyson Reed

I. Introduction

April 1, 1990 — the date designated by the U.S. Census Bureau as Census Day for the twenty-first decennial count of the population of the United States. Bureau officials projected that by or shortly after this date, 70 percent of approximately 100 million households would return their completed census questionnaires by mail to the Bureau.[1] To enumerate the remaining 30 percent, the Bureau would hire workers to canvass households door-to-door.[2] However, the Bureau's projections and expectations for the 1990 census were not matched by the ensuing reality. April 19, the Director of the Census Bureau reported that the actual mail-in response rate would be significantly lower than originally predicted. Only 63 percent of households (as compared to a final mail-in response rate of 75 percent for the 1980 census)[3] would return the questionnaires from which population figures would be derived to determine the apportionments of congressional, state and local legislative districts,[4] the allocation of billions of dollars by federal, state and local governments, and formulations of a wide array of public and private programs.[5] The Bureau would therefore be faced with carrying out greatly expanded follow-up operations to count those who had not responded or had not even been reached.

The Census Bureau has long acknowledged that the decennial census results in an undercount of the population of the United States, and that the undercount among minorities has been substantially higher (a "differential undercount") than the national undercount.[6] Although Census Bureau officials made preparations to carry out a program to correct for the expected undercount in the 1990 census, they were overruled by officials in the Department of Commerce, under whose jurisdiction the Bureau falls.[7]

In its 1989 report, the Citizens' Commission on Civil Rights documented the actions of the Commerce Department in prohibiting the Census Bureau from going forward with the correction program.[8] The Commission recommended that, with so much at stake in assuring that the census be as accurate as possible, the Commerce Department should instead act promptly to authorize a statistical adjustment to correct for the undercount. The Commission's report further warned that if Congress or the new Administration failed to compel an adjustment before certification of the census count, the undercount would become a major issue requiring judicial intervention and resolution.[9]

That advice and its warning about timely action have so far not been heeded. In positions taken in several congressional oversight hearings spanning a year, in pending litigation and in guidelines published to implement a stipulation and order growing out of the litigation, the Commerce Department of the Bush Administration has generally signalled a continuing resistance, if not total adherence to its predecessor's rejection of an adjustment.[10]

Despite an aggressive outreach program by the Census Bureau, it is now well documented that the response to Census Day 1990 was considerably less than hoped. For many reasons, people resisted returning their census questionnaires. There were many reports of neighborhoods and entire communities that were missed altogether in the delivery of forms early on, as well as allegations by many localities about significant numbers of housing units and residents that were missed in the follow-up phases of the census enumeration effort.[11]

The experiences of Census Day 1990 and the months that followed increase the prospects that the significant undercounts of past censuses, especially of minorities in inner cities, will be repeated.[12] With congressional reapportionments and state and local redistrictings[13] for the 1990s rapidly approaching,[14] the remedy proposed by the Citizens' Commission in its 1989 report — prompt commitment to make a statistical adjustment — is now even more imperative to protect civil rights throughout the United States.

II. *City of New York v. Department of Commerce:* Round I

November 3, 1988, a complaint to challenge the decision of the Department of Commerce not to allow an adjustment was filed in the U.S. District Court for the Eastern District of New York.[15] The plaintiffs included New York and California; New York City, Chicago and Los Angeles; Dade County, FL; individuals residing in those jurisdictions; the U.S. Conference of Mayors; the National League of Cities; the League of United Latin American Citizens (LULAC); and the NAACP.[16]

The plaintiffs sought an order requiring the Census Bureau to conduct a full-scale post-enumeration survey of 300,000 households that had been planned as part of the Bureau's abandoned correction program, and to adjust the 1990 census for anticipated undercounts or overcounts in population by using the most accurate correction methods available. The plaintiffs also asked the federal district court to mandate that the federal government use the corrected population figures for all purposes for which it uses decennial census data.

The defendants argued that the plaintiffs did not have standing to bring the lawsuit. They also contended that the court lacked jurisdiction to hear the case because the decision not to correct the population count was a matter committed solely to the agency's discretion.

April 21, 1989, district court Judge Joseph M. McLaughlin denied the defendants' motion to dismiss the complaint and their motion for a summary judgment, and set a July 1989 hearing date.[17] Judge McLaughlin held that both the individual and the governmental plaintiffs had established standing to challenge the Department's decision and that the federal district court had authority to review it.[18]

July 17, 1989, the day the hearing was scheduled, the parties reached an agreement[19] that the Commerce Department would undertake a "thorough *de novo* reconsideration" of its decision not to adjust and would keep "an open mind".[20]

Under the terms of the stipulation and order approved by Judge McLaughlin, the Commerce Department had to publish by March 10, 1990, guidelines on the relevant statistical and policy grounds that would be applied to its decision on whether to adjust the census figures.[21] Census officials would have to conduct a post-enumeration survey (PES) in a manner that would assure that the results could be used to produce corrected population figures.[22]

No later than July 15, 1991, the Commerce Department must publish either the corrected population figures or a detailed statement, consistent with the final guidelines, explaining why no correction will be made.[23] Any population figures released before the determination about whether to adjust is made would have to carry a notice warning that the data are not final and are subject to being corrected.[24]

The final provision of the stipulation and order stated that "plaintiffs reserve the right to challenge any of the guidelines ... adopted, omitted, implemented, or announced in connection with or arising out of this Stipulation".[25]

III. Implementation of the Stipulation and Order

September 29, 1989, Secretary of Commerce Robert A. Mosbacher announced his appointment of an eight-member Special Advisory Panel on the 1990 Census[26] to assist in establishing standards for implementing the stipulation and order.[27] Panel members were to receive "the fullest cooperation" of the Department in carrying out their mandate.[28]

The proposed guidelines were published in the Federal Register December 15, 1989.[29] The comment period, which originally was to end January 25, 1990, was subsequently extended to February 2.[30] With its publication of the guidelines, however, the Department demonstrated that its promise to take an unbiased new look at the question of adjustment was a weak one, at best.

The Department proposed twelve guidelines. Both collectively and individually, the proposed guidelines established an overwhelming presumption against a final determination to permit an adjustment.

For example, proposed guidelines four through nine contained language that the census count "may be adjusted *only if* ..."[31], thus permitting the Department's conclusions about any one guideline, however irrelevant to the question of whether a more accurate census could be achieved, would be a sufficient basis for refusing to make a correction. The inclusion of such terms as "unequivocally" and "compelling" in proposed guidelines five and nine as standards to be met before an adjustment would be warranted further illustrated the Department's predisposition not to allow an adjustment.[32]

The specific provisions of two proposed guidelines emphasized that an adjustment might not be made *even if it would ensure a more accurate count*. These included proposed guideline eight: "*only if* the adjustment is fair and reasonable, and is *not excessively disruptive* to the orderly transfer of political representation"[33] and proposed guideline nine: "*only if there are compelling* statistical and policy reasons to do so," even if the adjusted count would be an improvement by comparison to the 1980 effort.[34]

Proposed guideline six was especially remarkable: "The 1990 Census may be adjusted only if the general rationale for the adjustment can be clearly and simply stated in a way that is understandable to the general public."[35] In other words, the government would owe no duty to remedy its violation of civil rights (the long acknowledged differential undercounts and their attendant consequences for political representation and access to governmental benefits and programs) unless the general public can be made to understand.

Proposed guideline twelve appeared to be the ultimate escape hatch, especially when viewed in the context of other guidelines with strong presumptions against an adjustment. That proposal would have allowed an adjustment "only when sufficient data are available and analysis of the data is complete enough to make such a determination. If sufficient data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust."[36]

The House Subcommittee on Census and Population of the Post Office and Civil Service Committee held oversight hearings on the proposed guidelines, January 30, 1990.[37] At that hearing, Michael R. Darby, Under Secretary of Commerce for Economic Affairs, testified in defense of the proposed guidelines.[38] During his testimony, Under Secretary Darby characterized the guidelines as only "proposed guidelines" for which the Department was "soliciting comments because we expect to learn from them ... to thoroughly analyze all of the public comments ... and to make any appropriate changes."[39] He provided no explanation for why the tone of the proposed guidelines was so heavily weighted against a decision to make a correction of the census.

In discussing proposed guideline twelve, which provided that no adjustment would be made if sufficient data were not available by July 15, 1991,[40] Darby repeated a signal that had been raised by the Department in hearings before the Subcommittee in October 1989,[41] that the issue of timing could be used as the key factor against an adjustment. He stressed that the date set as the deadline was a compromise between the plaintiffs, who believed a determination could be made earlier, and the Department, whose position was that July 15, 1991, was the *earliest* date by which there would be even a *50-50* chance that sufficient data would be available.[42] He acknowledged, however, that the deadline could be met.[43]

At the same hearing, Dr. Barbara A. Bailar, the executive director of the American Statistical Association and a former Census Bureau official who had resigned in protest over the Commerce Department's decision prohibiting the correction program,[44] testified extensively on the flaws she found in each of the guidelines,[45] including the emphasis on policy issues to the exclusion of technical guidelines.[46]

Dr. Bailar challenged the Department's assertion that a correction of the 1990 census would be the first adjustment ever, citing methods of adjustment that had been used in 1970 and 1980 and one planned for 1990.[47] She also commented that the "dress rehearsals" carried out in several areas in 1986 and 1988 had revealed that the many coverage-improvement outreach techniques being undertaken by the Census Bureau for 1990 would not eliminate the differential undercount.[48]

Finally, she argued that a basic model for a correction program already existed,[49] and strongly disputed the Department's claims — implicit in proposed guideline twelve and the Department's testimonies to the Subcommittee — that the analysis of correction operations could not be carried out before July 15, 1991.[50]

Several other persons testified at the hearing or submitted written statements or letters to the Subcommittee objecting to all or part of the proposed guidelines. Among those criticizing the proposed guidelines were four members of the Special Advisory Panel.[51]

Professor Eugene P. Ericksen, one of the panel's co-chairs, noted that the panel — whose mandate included advising the Department on the sufficiency of its guidelines — had not received any drafts of the guidelines until just before its two meetings — the evening before the first meeting and two days before the second.[52] He reported that, despite this inauspicious start, the Department had apparently taken the panel's comments seriously because the proposed guidelines as published were much clearer than the drafts the panel had reviewed. But he objected to the Department's publication of proposed policy guidelines without technical guidelines[53] and to several specific guidelines.[54]

March 12, 1990, the Commerce Department issued its final guidelines.[55] The final guidelines — eight instead of the proposed twelve — were considerably less strongly worded and therefore less obviously biased against an adjustment.[56] Some guidelines and their accompanying explanations, for example, appeared to require a more balanced analysis of the factors mitigating both for and against an adjustment.[57] Moreover, the introduction provided that the guidelines would "be weighed collectively. Not every consideration in each guideline need be completely satisfied or resolved in order to reach a decision."[58]

Nevertheless, the final guidelines contained strong clues that the Department was still not disposed to look favorably upon a statistical method of improving the census count. For example, in wording almost identical to that of proposed guideline eleven, final guideline five provided that "Any adjustment of the 1990 Census may not violate the United States Constitution of (sic) Federal statutes."[59] Thus, as it had with proposed guideline eleven, the Department sought to cast doubt upon the legal basis for using an adjustment to achieve the most accurate count practicable.

Final guideline six was strikingly similar to the escape clause of proposed guideline twelve. The revised guideline provided that "There will be a determination whether to adjust the 1990 census when sufficient data are available, and when analysis of the data is complete enough to make such a determination. If sufficient data and analysis are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 census."[60] In other words, since the previous Administration's Commerce Department had prevented Census Bureau officials from proceeding with preparations three years earlier, this Department could now claim untimeliness and insufficiency of the data — the elements most susceptible to manipulation — as the overriding rationale for not making an adjustment.[61]

Thus, although the overall tone of the final guidelines was less hostile than that of the proposed guidelines, the Department's position on the proper analysis to be applied to the determination about whether to carry out a correction program was still not very reassuring. While the proposed guidelines were explicitly biased against an adjustment, the final guidelines still left the Secretary of Commerce with considerable discretion to decide not to adjust, even for a more accurate census result.

IV. *City of New York v. Department. of Commerce:* Round II

In response to the final guidelines, the plaintiffs in *City of New York v. Department of Commerce* filed, April 11, 1990, a motion for a declaratory judgment and a supplemental order to enforce the July 17, 1989 stipulation and order. In challenging the guidelines and other actions of the Department in implementing the July 17, 1989 stipulation and order, the plaintiffs sought a declaratory judgment that a statistical adjustment does not violate the Constitution or the statute governing the census.[62]

The plaintiffs also requested a supplemental order invalidating the guidelines; directing the defendants to adjust the census unless they could prove that the enumeration was more accurate or that there was some other compelling reason for not making an adjustment; and cooperating with the special advisory panel on funding and other assistance required by the stipulation and order.[63]

Despite the provision of the stipulation that preserved the plaintiffs' right to challenge the guidelines,[64] the defendants argued that the plaintiffs' challenge of the guidelines (and ultimately the decision whether to adjust) presented a nonjusticiable political question. They further argued that the claims were not ripe for review because the guidelines, although final, had not yet been applied, and because the Secretary of Commerce had not yet made a decision whether an adjustment was constitutional.

On June 7, 1990, Judge McLaughlin issued a decision denying the request for a supplemental order to invalidate the guidelines or to order an adjustment, but granting the motions for a declaratory judgment on the validity of an adjustment and for a supplemental order on the defendants' obligation to cooperate with the special advisory panel.[65]

Judge McLaughlin concluded that the guidelines provided valid factors to be applied in a final determination on whether or not to adjust the census count. He noted that the stipulation as worded required the Department to adopt guidelines on "what *defendants* believe are the technical and nontechnical statistical and policy grounds for decision."[66] While the final guidelines were only minimally acceptable, nevertheless they were within the Commerce Department's discretion under the terms of the stipulation.[67]

But he granted the motion for a declaratory order that a statistical adjustment of the census is valid.[68] He noted that, in his April 27, 1989 ruling that the plaintiffs had established standing to sue, he had already recognized that the Constitution requires the census to be as accurate as practicable.[69] He concluded that, in seeking to achieve an accurate census, the "concept of statistical adjustment is wholly valid, and may very well be long overdue".[70]

Although he rejected the plaintiffs' arguments that the guidelines were biased or based on impermissible factors, Judge McLaughlin acknowledged that several of the guidelines were susceptible of being abused.[71] He cautioned the defendants against such abuse, reminding them that the ultimate decision whether to adjust must be unbiased[72] and warning that in providing only minimal guidelines, they had "clearly incur(red) a heavier burden to explain why no adjustment was made in the event the Secretary elects to proceed with an actual enumeration.[73]

He further held that the effect of his judgment that an adjustment was valid was to make final guideline five moot.[74] As to guideline six's escape hatch, Judge McLaughlin reminded the defendants that in entering into the stipulation, they had acknowledged that adjustment-related operations (including the July 15, 1991 deadline) were feasible. Therefore, "(i)ntentional inaction will not be tolerated. Defendants are expected, and indeed required, to honor their solemn commitments embodied in the Stipulation."[75]

V. Implementation of the Census Enumeration Effort

The Department's resistance to an adjustment — as demonstrated in congressional oversight hearings, the proposed and final guidelines, its dealings with the special advisory panel, and its posture in the ensuing litigation — was troubling in light of the acknowledged history of significant undercounting. Its position became even more disturbing as ominous signs arose that the 1990 enumeration effort would not, despite all efforts, do much to prevent a repeat of history.

For the 1990 census, the Census Bureau had planned a number of techniques to improve its ability to reach and enumerate the population.[76] Implementation of an ambitious program of expanded outreach, private sector participation, and local government review, among other activities necessarily required strong leadership throughout the enumeration period. Yet, for nearly one year during the crucial planning and implementation period, including negotiations of the stipulation and the initial drafting of proposed guidelines, the Census Bureau operated without a director. In December 1989, just four months before Census Day, President Bush appointed Dr. Barbara Everitt Bryant to the post.[77]

From March 23, the date most households were scheduled to receive their census forms,[78] through mid-April, well after Census Day, complaints poured in throughout the country, about households, multi-unit buildings and even entire communities that had never received the forms.[79] Census Bureau officials reported that about 4.8 million questionnaires initially were returned by the U.S. Postal Service as undeliverable; another 5 million were sent out late.[80] In addition, many callers trying to use the special toll-free hotlines that the Bureau had set up reported being unable to get through or getting no assistance if they did get through.[81]

The problem was especially acute in urban centers, where the differential undercount of minorities already was expected to be a major problem. This included cities participating in the adjustment lawsuit, such as New York, where city officials estimated that 10 percent of households did not receive forms; Los Angeles, where the U.S. Postal Service reported that more than 70,000 forms either were undeliverable or had been incorrectly addressed; and Houston, where entire subdivisions had been missed and it was estimated that up to 10 percent of households would not receive forms.[82]

Even among those residents who apparently received the forms, the pace and rates of responses by mail were considerably slower and much lower than anticipated.[83] The mail-in rate reported for several cities was particularly discouraging: as low as 48 percent for Boston, 49.4 percent for New Orleans, 53.7 percent for New York, 54 percent for Chicago and 57.5 percent for Phoenix, where an outreach program developed by city officials had been cited by the Census Bureau as a model for other cities.[84]

A number of factors have been cited to account for the public's resistance to cooperating with the 1990 census. These have ranged from privacy concerns and fear and distrust of government, to the saturation of households with other surveys and questionnaires, to individuals' inability to comprehend or complete the census forms.[85] At least one commentator has suggested that it is inevitable that the existing enumeration techniques will be unsuccessful in reaching the population in such a highly mobile and diverse society.[86] Whatever the causes, by the time the door-to-door canvassing of those had been missed or those who had failed to respond to the census was scheduled to begin April 26, this follow-up phase of the enumeration had taken on a much larger significance than planned.[87]

In the face of mounting evidence that the 1990 census was in trouble, and that there were clear signals from the enumeration effort itself, as well as the historical patterns, that a differential undercount was likely to result yet again, Census Bureau officials responding to public complaints continued to defend the program and to resist calls for a decision to adjust the census.

At an oversight hearing convened by the House Subcommittee on Census and Population, April 19, Census Director Bryant responded to the Bureau's critics, arguing that it was too soon to decide that the enumeration effort was a failure. In acknowledging the slow responses and the initial mailing difficulties, Dr. Bryant outlined planned follow-up activities that remained to be conducted, as well as additional outreach that had been undertaken to generate greater mail-in responses.[88] She testified about the need for supplemental funding to carry out the expanded door-to-door phase of the enumeration.[89]

At field hearings conducted by the Census Subcommittee in New York City, May 21, Dr. Bryant reiterated her position that it was too soon to determine how well the census would turn out. As she outlined the follow-up that remained to be carried out and described how the census was being handled in New York, she added that, "We remain convinced we will have an accurate census."[90]

Others who testified at the hearings or submitted written statements had a very different view of how well the census was going in New York. These included the American Jewish Congress, which described problems in determining the availability and accuracy of Russian and Yiddish language assistance;[91] and the League of Women Voters Education Fund of the City of New York, whose telephone information service had received 20 to 50 calls daily through early April from New York residents who had not received their census questionnaires.[92]

Gumersindo Estevez of the Esperanza Center, which provides educational and social services to Hispanic immigrants and native Americans residing in the Washington Heights and Inwood neighborhoods, reported the chilling effect on the census of raids conducted by the Immigration and Naturalization Service and other agencies during the census enumeration campaign.[93] Lillian Fernandez, a member of the Congressional Minority Task Force on the Census, cited the Census Bureau's failure to adopt several recommendations that pretests had suggested would be needed to improve the public's response, especially among those who would be hard to reach. This included the Bureau's decision to offer Spanish language forms only to those who called to request them, even in communities in which Hispanics were heavily concentrated.[94]

Another major area of concern for the 1990 census was a concerted effort by the Census Bureau to count a population whose size has been widely disputed for several years. For the first time since homelessness became recognized as a major national problem, the Census Bureau carried out operations to attempt to document the extent of homelessness throughout the country. The Bureau did not plan to either officially define or to provide a total count of the homeless. Instead its stated goal was to provide a count and basic characteristics of selected components of the homeless population.[95]

The principal operation was a special enumeration program, the "Shelter and Street Night", designed to count homeless persons at previously identified locations.[96] During the night and early morning of March 20-21, the Bureau sent out workers to find and count people in three stages: residents of shelters, missions, hotels and motels, armories and other places known to be housing the homeless were counted between 6 p.m. and midnight; people on the streets between 2 a.m. and 4 a.m.; and people found outside abandoned buildings between 4 a.m. and 6:30 a.m.[97]

In the first of five independent studies evaluating the Bureau's efforts to enumerate the homeless in selected urban areas,[98] investigators for the Los Angeles Homeless Health Care Project released a report, June 8, in which they estimated that 59 percent to 70 percent of the homeless on the streets of Los Angeles were missed.[99]

Based on observations at thirty-nine street locations and commercial sites in downtown Los Angeles between 2 a.m. and 4 a.m. and follow-up interviews with a sample of homeless people, the report estimated that over 500 people were missed at 30 sites targeted by the Census Bureau, and over 355 at nine other sites selected for the study.[100] Because these thirty-nine sites represented only 13 percent of the total sites targeted by the Bureau for enumeration activities, the authors concluded that thousands of homeless people may have been missed overall.[101]

The report cited several factors that contributed to the observed undercount in Los Angeles, including the behavior of enumerators[102] and homeless people,[103] the alienating presence and visibility of the police and the media,[104] the incompleteness of the list of street and commercial sites,[105] the absence of bilingual enumerators,[106] and fears of undocumented workers about contact with government officials.[107] The authors of the report commended the Census Bureau's efforts to grapple with such an inherently difficult enumeration, but strongly recommended that the census data derived from the count, which they found to be unreliable, not be used for developing or implementing public policy.[108]

By July 1, the Census Bureau reported that 99 percent of households that had not mailed back their forms had been counted, with the count complete in twenty-seven states.[109] Nevertheless, in several states — including New York, California, Delaware and Maryland — and in several major cities — including New York, San Jose, San Francisco and Boston — the completion rate for non-responding households still lagged.[110]

Given the Census Bureau's acknowledged difficulties of missing people and getting lower-than-expected responses during the mail-in phase of the enumeration, concerns have been expressed about the thoroughness of the follow-up enumeration operations. The canvassing conducted by temporary workers from April 26 to late July involved trying to reach households and areas that are the most difficult to reach, as well as compensating for the unexpected fall-off in mail responses.

The observations of representatives of community-based service agencies and other organizations most familiar with populations that historically have been disproportionately undercounted, as well as acknowledgements by census workers in the field, raised many questions about the accuracy of the door-to-door follow-up. This, in turn, fueled concerns that significant portions of those population groups once again had been missed in the 1990 enumeration.[111]

Even as questions were being raised about the thoroughness of the follow-up enumeration operations and the continuing efficacy of the census enumeration process itself in modern society, officials of the Commerce Department were showing signs of closing, rather than keeping open their minds about the possibility of an adjustment.

Well before any of the scheduled post-census checks for errors —including the post-enumeration survey mandated to determine the need for any correction of the census — could be completed, Under Secretary of Commerce Michael Darby was quoted as describing the 1980 census (with its admittedly significant differential undercount) as "the best ever conducted" and the 1990 effort as giving officials "every reason to believe that (it) will outstrip even that census in terms of its accuracy and quality".[112] That the Department's mind might not have completely shut, however, was reflected in his statement that his assessment was "just the feel of it based on the opinions of people who have been through it before."[113]

Nevertheless, late in July, still without either the preliminary counts for the local governments' review or the results of the post-enumeration survey, Secretary of Commerce Robert Mosbacher, who must make the decision about adjustment with an "open mind," was quoted as believing that the census count was "a very complete, full and fair count of everyone."[114]

His observation became very ironic less than a month later when, as part of its post-census local review, the Census Bureau released its preliminary housing unit counts and population figures for twenty-six states and Puerto Rico, August 21.[115] More than any of the operational difficulties that had been reported throughout the country, the Bureau's own figures graphically called into question the accuracy of the 1990 enumeration.

These figures, for states representing 26 percent of the total population, were well below (more than 2 percent) the Bureau's own projections.[116] It was further revealed that if these patterns held up nationwide — once the figures for the more populous states (*e.g.*, New York, California, Florida, Illinois and Texas) were available, the discrepancy between the Bureau's projections and its preliminary counts for 1990 could total as many as 5 million people.[117]

By the end of September, over 6,000 cities, counties and towns (including all of the fifty-one largest cities) had filed objections to the preliminary figures.[118] Composite analyses of the claims of just fifteen of those cities suggested that as many as 500,000 housing units, representing as many as 1.2 million people, may have been overlooked.[119] Several localities argued that the census enumeration had missed thousands of housing units or mistakenly assigned them to neighboring jurisdictions.[120] Although the Census Bureau responded that a recanvassing revealed that the initial housing counts had missed relatively few units, several cities countered that even in those units that had been included, not all the residents had been counted; some challenged the accuracy of the Census Bureau's conclusions about their vacancy rates.[121]

Moreover, concerns were raised, and some census field workers acknowledged, that much of the data obtained through follow-up canvassing of missed or non-responding households would be incomplete and considerably less reliable because they were collected by "last-resort" methods, *i.e.*, through reliance upon third-party sources to verify information after multiple attempts to contact unit occupants had failed.[122]

In the wake of all of the local challenges of the preliminary data, while maintaining the caveat that all census operations were not completed and that the figures were likely to be changed before being made final,[123] Census Bureau and Commerce Department officials continued to express satisfaction with the progress of the census effort.[124] For hearings held by the House Subcommittee on Census and Population, September 11, Census Bureau Director Bryant reported the timetable and status of work on the post-enumeration survey (PES) that would, under the terms of the July 17, 1989, stipulation and order, be the basis for the Department's determination of whether to permit a statistical adjustment of the census figures.[125]

Dr. Bryant reported that, despite delays caused by the need for greater follow-up to non-responding households in hard-to-enumerate areas, work on the PES was largely back on schedule.[126] She warned, however, that completion of evaluation studies, scheduled for May 1991, was the "part of the PES timetable at the greatest risk."[127] She also noted that this operation would include eighteen studies of the PES itself, eleven studies of demographic analysis, and one study of synthetic assumptions underlying adjustment.[128]

At the same hearing, Deputy Under Secretary of Commerce Mark W. Plant once again reminded the subcommittee "that we have repeatedly noted that, in the judgment of the professional staff of the Census Bureau, there is only a 50:50 chance that enough information will be available to allow a possible adjustment of the census by July 15, 1991. That, in no way, reflects a lack of willingness on the part of the Department to consider adjustment — rather it reflects our overriding concern with data quality — in particular the quality of decennial census data on which the quality of so many of our statistics depend."[129]

He promised, however, that "this extraordinary public policy decision, which depends upon being informed by the elaborate post-enumeration survey coverage evaluation program, will be made in the open. The mechanism put in place by the stipulation and order ensures that the basis for the Secretary's decision will be well known and explained."[130]

On September 27, two days after another oversight hearing,[131] Subcommittee Chair Thomas C. Sawyer and with thirty-two cosponsors introduced H.R. 5741, the Decennial Census Accuracy Improvement Act. The bill, which was reintroduced in identical form the opening days of the 102nd Congress, would amend Section 141(c) of Title 13 to prohibit the Secretary of Commerce from releasing official census data until after making a determination about the need for a statistical adjustment for the 1990 and subsequent decennial censuses, to allow the release of preliminary data only for informational purposes, and to require that the Secretary make a progress report to Congress by April 1, 1991.[132] The bill also would amend Section 195 to codify judicial decisions that statistical sampling techniques may be used in taking the decennial census. At the time of publication, the bill had not yet been acted upon by the Congress.

VI. Redistricting and the Legal Services Corporation Rule

It has been noted that, of all the uses to which the census is put, the most fundamental is for reapportionment and redistricting at the federal, state, and local levels. The linkages of the census enumeration and reapportionment processes to the vindication of civil rights is nowhere better illustrated than in actions of the private Legal Services Corporation, whose board of directors is appointed by the President with the advice and consent of the Senate. Even as the Commerce Department continues to show signs of resisting calls for a statistical adjustment of the 1990 census, the Legal Services Corporation has been pursuing a course to prevent local legal services programs from providing their clients legal assistance in matters involving either the census or the redistrictings that will follow.

In 1989 the Legal Services Corporation board, whose members had been appointed by former President Ronald Reagan, adopted a regulation to prohibit legal services programs from participating in census and redistricting matters. With new board appointments by President Bush, the Legal Services Corporation continues to interfere with the effective participation of poor people in the vindication of their civil rights by voting in the summer of 1990 to appeal a federal district decision that had invalidated the regulation.

On March 14, 1989, the Legal Services Corporation issued a proposed rule prohibiting legal services programs from "any effort, directly or indirectly, to participate in the revision or reapportionment of a legislative, judicial, or elective district at any level of government, including influencing the timing or manner of the taking of a census."[134]

At a meeting of the Operations and Regulations Committee, April 13, 1989, the final day that comments were due, a recommendation was made to present a revised rule to the full board the next day. April 14, just one day after the comment period ended, the board adopted the revised rule.[135]

The final rule, which was published August 3, 1989, to take effect September 5, 1989,[136] provided that "Neither the Corporation nor any recipient shall be involved in or contribute or make available any funds, personnel, or equipment for use in advocating or opposing any plan, proposal, or litigation intended to or having the effect of altering any redistricting at any level of government."[137] The final rule "clarified" permissible activity: the handling of Voting Rights Act litigation that did not involve redistricting; the use of public or tribal funds for the purposes for which they were provided; or the handling of cases on attorneys' personal time with resources other than those of the legal services program.[138]

The rule lacked a "grandfather" provision allowing local programs to continue work on pending cases. On inquiry by affected local programs, Corporation staff interpreted the omission as a requirement that the programs drop their pending cases, in addition to not taking on any new cases.[139]

On December 29, 1989, three legal services programs with redistricting cases pending — Texas Rural Legal Aid, California Rural Legal Assistance and Mississippi Rural Legal Services — filed suit in the federal district court for the District of Columbia to challenge the rule.[140] The plaintiffs sought a declaratory judgment invalidating the rule and filed for summary judgment, February 26, 1990.

The Legal Services Corporation countered, April 6, with a motion to dismiss or in the alternative for summary judgment.[141]

In an order filed June 25, 1990, the federal district court granted the plaintiffs' motion for summary judgment. Judge Gerhard Gesell held that the Legal Services Corporation lacked the authority to promulgate the rule and issued a permanent injunction against its enforcement.[142]

In a demonstration of its intent to continue its predecessor's efforts to circumscribe the ability of legal services programs to effectively represent their clients in redistricting matters, the new board filed, July 3, 1990, a notice of appeal to the U.S. Court of Appeals for the District of Columbia Circuit.[143] At the time of publication, the appeal was pending.

VII. Conclusion

Despite the aggressive and comprehensive coverage-improvement operations devised by the Census Bureau, the 1990 census enumeration effort has been fraught with critical problems, perhaps inherent in the enumeration effort itself. Early mishaps, as well as preliminary figures that significantly depart from the Census Bureau's own expectations, have demonstrated that there is ample reason to be concerned about the accuracy of the count that has been conducted and the ability of planned follow-up techniques to adequately resolve discrepancies.

To adhere to an enumeration process that produces unreliable and inaccurate population figures when it is possible to produce a more accurate final census would perpetuate the representational and financial losses that have occurred after previous censuses in jurisdictions whose populations were undercounted. Yet the Department's positions and public statements to date have called into question its commitment to keep the open mind it is obligated to apply to the adjustment decision.

The methodology for a statistical correction of the census exists; indeed some correction methods have been used by the Census Bureau in the past and are being used for 1990. Moreover, the validity of a statistical adjustment of the census has been recognized in the courts, and one court has served notice that the Commerce Department bears a heavy burden to justify its determinations if it fails to correct the figures derived from the 1990 enumeration.

Especially in light of the acknowledged history of significant undercounting in the census and the enormous problems identified during the 1990 effort, it is more imperative than ever that the Commerce Department and the Census Bureau move forward expeditiously with operations to make a statistical correction of the census.

The outcome of the lawsuit challenging the Legal Services Corporation's rule prohibiting legal services programs from handling census and redistricting matters is pending in the federal courts. But this nation's interests would be better served if the Corporation would cease its efforts to validate a rule that would deprive poor citizens of legal assistance to vindicate their civil rights to fair political representation and allocation of benefits and programs.

Chapter XIX

Rights of Institutionalized Persons

by James B. Kaufman, Robert Plotkin, and Jacqueline FitzGerald Brown with assistance from Christopher Gilkerson, Andrew Mastin, and David Shaman

I. Introduction

There are a number of emerging issues concerning the rights of institutionalized persons.

A. Overcrowding

The overcrowding of prison facilities is perhaps the most pressing problem facing correctional institutions throughout the nation.[1] The nation's prison population has undergone explosive growth during the early years of the Bush Administration, exacerbating a problem which had already reached crisis proportions under President Reagan.[2] In the first six months of 1989, the increase in the number of persons incarcerated exceeded the previous growth record for an entire year. The rate of growth translates into a need for 1,800 new prison beds every week.[3]

As a result of this explosive growth, many correctional facilities are crowded to the point of bursting. Some state prison systems are operating at as much as 175% of their intended capacity, and prisons in at least forty-two states are under some type of court order to reduce overcrowding.[4] The need to house additional prisoners has made common the practice of "double-celling," which places two or more prisoners in cells designed for one; in one state, inmates have been double-celled in cells as small as six-by-six and one half feet.[5]

The surge in the prison population is at least partially attributable to the advent of mandatory minimum sentences and the continued "get-tough" philosophy espoused by many public officials and members of the public.[6] New laws designed to combat crime, particularly drug-related offenses, have included harsh mandatory sentences. At the federal level, the Sentencing Guidelines promulgated by the United States Sentencing Commission[7] have exacerbated the problem by reducing the flexibility of judges to recommend shorter sentences or alternatives to incarceration. Statistical evidence indicates that such laws have primarily increased the number of young and first-time offenders incarcerated, rather than the number of dangerous, violent criminals imprisoned.[8] Many of these lesser offenders might not otherwise have been sentenced to prison terms.

Federal judges have almost uniformly expressed frustration with the Sentencing Guidelines and with mandatory minimum sentences in general.[9] There is nonetheless a movement at the state level to adopt similar guidelines, and an ongoing spate of legislation proposing ever-tougher sentences.[10] Such proposals, were they to become law, would only increase already severe overcrowding problems.

One potential means of easing overcrowding in prisons is the adoption of so-called "intermediate punishments." Such punishments, which include "boot camps," house arrest, fines, restitution, community service, and intensively supervised probation, are frequently employed in Western Europe, but the United States has been slow to develop similar programs.[11] These punishments can operate as "front door" programs for the initial assignment of less serious offenders, or as "back door" programs for the early release of low-risk prisoners; either way, they serve to reduce prison crowding and to decrease the expense of punishment by avoiding the high cost of incarceration.[12] Legislation has been proposed to authorize grants to states for boot camp projects as alternatives to the imprisonment of persons for nonviolent offenses; offenders would be given drug treatment, literacy education, vocational education, and job training.[13] Principled incorporation of such programs into exisiting sentencing schemes, together with consistent and comprehensive application, could aid in alleviating the problem of overcrowding.

Another possible avenue of relief is to repeal mandatory minimum sentences and remove the compulsory status of the Sentencing Guidelines. The Federal Courts Study Committee, a blue ribbon panel commissioned by Congress to recommend changes in the functioning of the federal judiciary, issued a report on April 2, 1990, finding that there was "a compelling need" to repeal mandatory minimum sentences "in light of the huge projected increase in the federal prison population."[14] The Committee observed that many offenses now carry mandatory minimum sentences established by Congress that exceed those imposed by the Guidelines and that are "much longer than appear reasonable to many observers."[15] It also noted that prisoners serve those terms in full because of the elimination of parole for many offenses. The Committee therefore proposed that Congress repeal mandatory minimum sentence provisions.[16]

The Committee then considered the Sentencing Guidelines. Although it acknowledged that there is a pervasive concern among judges, public defenders, private defense counsel, and the organized bar that the Sentencing Guidelines are causing serious problems, a majority of the Committee yielded to the "strong urging" of Sentencing Committee members to engage in continued study and monitoring of the Guidelines' effectiveness before recommending changes.[17] Taking a position consistent with the Bush Administration's "thousand points of light" philosophy, the Committee urged that such study should be conducted by individuals and groups from across the legal spectrum, not just the Committee or other governmental agencies.[18]

By recommending study, rather than action,[19] the Committee backed away from its draft proposal, which called for the Guidelines to be treated not as compulsory rules but as general standards identifying a presumptive sentence. This presumptive sentence would be subject to variation based on factors such as the age and personal history of the offender.[20] A group of dissenters chastized the majority for not adopting this proposal, stating that the Guidelines were "failing miserably" and that of the 270 persons who testified at nine public hearings, the only four who spoke against the proposal were three past or present members of the Sentencing Commission and the United States Attorney General.[21] Indeed, in light of the tremendous burden being placed on the prisons by overcrowding and the need to protect prisoners' civil rights, some modification of the Sentencing Guidelines seems necessary.

B. THE AIDS EPIDEMIC

As the disease of AIDS continues to spread through the population at large, it will present an ongoing challenge for prison officials and the courts. The thorny issues raised by AIDS in a prison environment fall into four main categories: testing, segregation, privacy, and treatment. These issues have already produced a substantial body of litigation in the federal courts. While many of the published decisions are in conflict with one another and no clear rules have emerged, there is an obvious policy of deference to prison officials which harmonizes with the courts' attitude toward other aspects of prisoners' rights litigation.[22]

1. TESTING

The courts have generally held that mandatory blood testing of prisoners to determine exposure to the AIDS virus does not violate the Fourth Amendment.[23] In balancing a prisoner's right to privacy against the state's purpose, they have found that a prisoner's diminished privacy interests, further weakened by the low degree of intrusiveness of blood tests in modern society, are outweighed by the strong interest of prison officials in detecting and preventing the spread of AIDS.[24] At the same time, courts have held that failure to test inmates for AIDS does not violate the rights of those who seek to be protected from infection.[25] These courts have noted that the tests are not always accurate and may create a false sense of security, and have expressed a reluctance to become involved in a medical controversy by dictating prison guidelines in an area where the medical community itself is not in agreement.[26]

2. SEGREGATION

The courts' willingness to defer to prison officials is also evident in this context. Briefly stated, they have found that it is constitutional either to segregate inmates with AIDS or to intermingle them with the general prison population, and that the decision is properly left to prison authorities. In the past several years numerous cases have been brought by prisoners who do not have AIDS claiming that housing them together with inmates infected with the AIDS virus violates the Eighth Amendment's prohibition of cruel and unusual punishment.[27] The courts have consistently rejected such claims, holding that plaintiffs must show that they faced a real and immediate threat of injury. The courts are not unaware that high-risk activities such as sexual intercourse and the sharing of needles occur in prisons; however, they have required plaintiffs to show that they were personally exposed to such practices in order to maintain an action.[28]

On the other hand, where segregation policies have been instituted, the courts have consistently upheld them against a wide variety of constitutional challenges. Equal protection claims have been rejected because the courts do not consider inmates with AIDS to be similarly situated to uninfected inmates or to be a suspect class, and because segregation is rationally related to the legitimate end of preventing the spread of AIDS.[29] Protecting AIDS patients from exposure to secondary diseases present in the prison population, protecting guards, and maintaining control and security within prisons have also been advanced as legitimate reasons for segregating inmates with AIDS.[30] Segregation programs have also been upheld against claims under the First, Fourth, Fifth, and Eighth Amendments.[31]

3. PRIVACY

The ability of prisons to segregate inmates with AIDS may be cast into doubt, however, by cases which hold that inmates with AIDS have a right to privacy in their medical diagnosis. A number of courts have held that prisoners retain an interest in the nondisclosure of their AIDS status because of the extremely sensitive and personal nature of this information and the probability that its dissemination will subject the inmate to harassment, ostracism, and discrimination.[32] One court, however, has ruled that the diminished privacy interests of prisoners together with the state's interests in preventing the spread of AIDS makes the inmate's diagnosis a matter of public concern.[33] If the right to privacy is upheld in the future, it may curtail segregation programs because the courts announcing the right have found that placement in a segregated cellblock necessarily discloses the inmate's status as an AIDS victim.[34]

4. TREATMENT

Although there is no clear consensus, the courts have been reluctant to find that allegedly inadequate treatment of inmates with AIDS violates the Eighth Amendment. They have generally held that prison officials need only provide reasonably adequate care, which need not constitute the best care available or even particularly good care, so long as it does not manifest "deliberate indifference" to the prisoners' medical needs.[35] Prison officials are not obligated to provide experimental drugs or novel treatments, and have discretion to deny outside practitioners access to inmates with AIDS.[36] Most courts have been particularly deferential to the decisons of prison officials in this context because of the high degree of medical uncertainty and disagreement concerning the proper treatment of AIDS.[37] One court, however, has allowed a prisoner to be released on bond for the purpose of seeking AIDS treatment unavailable in the facility where he was held.[38]

The Federal Bureau of Prisons has recently promulgated new regulations governing the testing, treatment, counselling, and education of inmates with respect to AIDS.[39] These regulations may prove influential in shaping state policies and may promote the establishment of uniform practices. The regulations do not call for uniform testing of all incoming prisoners, but rather provide for random, mandatory testing and the discretionary testing of those who exhibit symptoms of the disease or engage in high-risk behavior. All tests are accompanied by counselling, and periodic education programs are mandatory for all inmates. Those who test positive for AIDS are not quarantined unless such a step is warranted by evidence that the prisoner may engage in conduct posing a health risk to others. Finally, inmates with AIDS receive monthly clinical evaluations, and those drugs approved by the FDA for treatment of AIDS are made available.

II. Statement of Governing Law

A. THE COURTS AND PRISONERS' RIGHTS

The Reagan years saw a revival of the doctine of deference by the courts in the context of prisoner's rights litigation.[40] In the first years of the Bush Administration, the courts have continued to give "due deference" to prison administrators when reviewing constitutional challenges to prison practices and regulations brought under 42 U.S.C. § 1983.[41] While not denying that prisoners indeed do have *some* constitutional rights, the approach of the federal judiciary may be summed up by a passage from a recent Supreme Court opinion: "[t]here is little doubt that the kind of [practice] just described would raise grave [constitutional] concerns outside the prison context . . . . We have recognized, however, that these rights must be exercised with due regard for the 'inordinately difficult undertaking' that is modern prison administration."[42]

The "due deference" approach, which dominated the case law prior to the mid-1960s,[43] has enjoyed a recent resurgence. This rebirth can be traced to *Procunier v. Martinez*,[44] in which the Supreme Court established a strict standard of review for prison regulations affecting prisoners' First Amendment rights, but also stated that "courts are ill equipped to deal with the increasingly urgent problems of administration and reform."[45] This dicta has become the cornerstone of a new, more relaxed standard of review of prison practices and regulations, which was clearly announced during the Reagan Administration in *Turner v. Safley*.[46] Justice O'Connor, writing for the majority, cited cases decided after *Martinez* in which the Court had applied something less than a standard of heightened scrutiny.[47] She then pronounced the "correct" deferential standard of review: "when a prison regulation impinges on inmates' constitutional rights, the regulation is valid if it is reasonably related to legitimate penological interests."[48]

The Supreme Court has continued to apply this standard under President Bush, and for the most part has continued the trend of limiting prisoners' civil liberties. In *Thornburgh v. Abbott*,[49] the Court rejected a First Amendment challenge to a regulation under which prison officials may prevent prisoners from receiving publications sent to them from outside the prison if the officials determine that any portion of the publications might be detrimental to security, discipline, or "good order." The Court relied on the *Turner* standard, and formulated a generous standard of reasonableness.[50] The Court has also held that states are not constitutionally required to provide indigent death row inmates with counsel in post-conviction proceedings,[51] and that prison officials may administer anti-psychotic drugs to inmates without their consent as long as proper internal procedures are followed.[52] In applying the reasonable relationship standard, other federal courts have essentially foregone serious scrutiny and have instead relied upon prison administrators' claims of serving "legitimate penological interests."[53] On a more hopeful note, however, a unanimous Supreme Court ruled that a federal court must apply a state law tolling the statute of limitations for actions by prisoners, in part because the tolling statute enhanced a prisoner's ability to bring suit and recover damages under section 1983.[54]

Despite the continuing "hands-off" approach of the federal judiciary in prisoners' civil liberties cases, the courts continue to monitor and oversee prison conditions cases which had their origin in the 1970s or 1980s. As discussed above, the problem of prison overcrowding is growing amid the rhetoric of a "war on drugs" and a "get-tough," "lock 'em up" mentality. The pressure on jail and prison resources has necessitated continuous litigation to ensure the enforcement of the right of prisoners to a minimum amount of space, as protected by the Eighth Amendment. In such cases courts have emphasized that neither good faith efforts on the part of prison administrators nor budgetary constraints alone provide legitimate excuses for non-compliance with previous court orders mandating minimum space requirements.[55]

The Eighth Amendment also protects prisoners' rights to humane living conditions, provision of adequate medical care, freedom from the use of excessive force by prison officials, and protection from other prisoners. In recent cases the courts have generally been unsympathetic to prisoner complaints. One court, rejecting a claim that fire safety was inadequate, held that prison conditions need not be the best possible to satisfy the Eighth Amendment, but only minimally adequate such that "inmates not be threatened with a constant, imminent risk of death or injury."[56] The court observed that "prison is not a country club" and invoked the principle of deference: "federal courts must avoid becoming enmeshed in the minutiae of prison operations, and should decline to second-guess prison administrators in the operation of correctional facilities."[57]

Consistent with this attitude, other courts have held that a variety of harsh disciplinary practices do not violate the Eighth Amendment.[58] With the recent departure of Justice Brennan, an ardent defender of civil liberties and the rights of criminal defendants, the Supreme Court is unlikely to provide significant protection for prisoners' rights in the future. Instead, they will have to depend on Congress for the advancement of their interests.

B. THE GOVERNMENT'S ROLE IN ENFORCING PRISONERS' RIGHTS

The Civil Rights of Institutionalized Persons Act (CRIPA)[59] grants the Attorney General authority to institute a civil action against a state or its officials if there is reasonable cause to believe that the state is subjecting persons residing in state institutions (including prisoners) to "egregious or flagrant conditions" causing "grievous harm" pursuant to a "pattern or practice of resistance."[60] The responsibility for CRIPA enforcement of prisoners' rights has been delegated to the Special Litigation Section, an arm of the Civil Rights Division of the Department of Justice.[61] In the case of prisoners, the United States may ask for "such equitable relief as may be appropriate to insure the minimum corrective measures necessary to insure the full enjoyment of [the prisoner's constitutional] rights, privileges, or immunities."[62] In addition, section 1997c grants the Attorney General authority to intervene in any action brought by private parties if the section 1997a profile is met.

Section 1997e of CRIPA gives the Attorney General the role of "certifier" rather than negotiator or litigant. This section contains an exception to the general rule whereby a properly formulated section 1983 suit does not require a plaintiff to first exhaust any state judicial or administrative remedies before seeking federal judicial relief. Under section 1997e, courts are granted discretion to stay a section 1983 case for up to ninety days pending exhaustion of "plain, speedy, and effective administrative remedies as are available." A court can require this exhaustion of remedies, however, only if the U.S. Attorney General has certified, or the court has found, that "minimum acceptable standards" have been met. Section 1997e(b)(2) defines minimum standards as including an advisory role in the administrative system for employees and inmates of the prison or jail, specific maximum time limits for written replies to grievances, priority processing of emergency grievances, safeguards against reprisals to grievances, and independent review of the disposition of grievances.[63]

III. Philosophy of the Bush Special Litigation Section

The Reagan years are over, and so too, perhaps, is the Justice Department's strong ideological, federalist approach to civil rights enforcement. Under the Reagan/Reynolds philosophy, the role of the Special Litigation Section was to secure only the "minimum corrective measures necessary" to protect inmates' constitutional rights. This often led to the Justice Department's actually opposing prisoners and public interest groups by asking courts to grant less relief than that consented to by the state defendants.[64]

Presently, the Special Litigation Section is essentially operating in a philosophical void; no internal or external policy statements regarding CRIPA have been issued. As with other civil rights groups in the Bush Department of Justice, the Special Litigation Section is still undergoing a transition period prolonged by the Senate's rejection of William Lucas and President Bush's delay in nominating another person for the sensitive post of Assistant Attorney General for Civil Rights. From his confirmation in March, 1990 until October 1990, John Dunne was preoccupied with the Civil Rights Act of 1990, which sought to reverse recent Supreme Court decisions curtailing remedies for discrimination in the workplace. In this environment, it would be an understatement to say that CRIPA and prisoners' rights were on the back burner; these issues seemingly were not even on anyone's agenda.

Arthur Peabody, Chief of the Special Litigation Section, has met with Dunne and asked for more discretion for his attorneys. Dunne has neither formally responded nor yet made any decisions giving an indication of his approach to CRIPA.[65] Adjoa Aiyetoro, Director of Legislative and Community Affairs with the National Prison Project and a former attorney with the Special Litigation Section, believes that "a clear sign of any formal change in policy will be an increase in the volume of [DOJ] litigation. We knew Reynolds was a supporter of states' rights within one month, so we should know soon where Dunne stands."[66]

Despite Dunne's inexperience in civil rights litigation, there are indications that some change in official policy could be forthcoming. First, Dunne has been willing to talk and listen to civil rights activists in meetings concerning the Civil Rights Act of 1990.[67] Shortly after his nomination became public, Dunne stated: "I'm the sort of person who's sensitive to all kinds of views — I'm a listener."[68] The National Prison Project and other prisoners' rights advocacy groups are hopeful of a meeting with the new Assistant Attorney General in the near future.

Second, unlike William Lucas, who was charged by civil rights groups with administering an "unconstitutional jail,"[69] the area of prisoners' rights is a bright spot on Dunne's record as a Republican New York State legislator. Dunne's role as an observer at the Attica Prison riots in 1971 has been repeatedly emphasized both at his confirmation hearings and by civil rights activists willing to give him the benefit of the doubt.[70] At that time, he was well known as the chairperson of a joint New York State Legislative Committee on Crime and Correction who led inspection trips to state prisons and sponsored various prison reform efforts.[71] Called to Attica by the rebelling inmates as one of only four outside observers, he not only prolonged the effort at a negotiated solution, but also made a politically risky though futile plea for Governor Rockefeller to come personally to Attica.[72] In the early 1960s Dunne also helped design and set up the first criminal division of the Legal Aid Society of New York, based on his personal observations of "what was happening to prisoners who could not afford counsel."[73]

IV. Enforcement Activity Under CRIPA

The Special Litigation Section currently consists of twelve attorneys (down from a high of twenty-six), three supervisors, 3 1/2 paralegals, and 2 1/2 secretaries. Despite allowing staff attorneys greater discretion in pending cases and no longer playing an overtly negative role, the Section under Bush has thus far failed to institute any new prison cases under CRIPA.[74] The relatively relaxed environment under Bush, however, has brought a substantial increase in the number of new investigations,[75] though no new investigation has led to any concrete action.

Neither DOJ, the media, Congress, or the public interest sector appear to be paying much attention to CRIPA enforcement at present.[76] Ironically, DOJ's philosophical and policy void has allowed Special Litigation Section staff attorneys more discretion in their investigations and enabled the attorneys to have a positive impact in some cases. For example, in *United States v. Michigan*, an action originally brought by the Department in 1981 and once upheld by Mr. Reynolds as a success of his non-interventionist philosophy,[77] the U.S. recently submitted a pleading which advocates a relatively wide scope of Eighth Amendment protection and opposes Michigan's arguments resting on the precepts of comity and federalism.[78] Michigan argued that the comprehensive relief the United States and *amici* had asked for (development and implementation of a professionally-based prison classification plan and a report on population growth management) exceeded the Attorney General's authority under CRIPA, in that the U.S. had failed to show a sufficient deprivation of prisoners' constitutional rights. The U.S. responded that prisoner classification implicates prisoner security interests protected by the Eighth Amendment, that "systemic classification relief [may] be ordered by federal courts,"[79] and that:

> [s]ince substantial increases in statewide inmate population could have a considerable impact and effect upon crowding, classification, mental health care and other requirements of the Consent Decree, the requirement that defendants prepare a report on their planning activities to cope with the expected population increase seems justified at this time.[80]

Summarizing the current situation, Elizabeth Alexander, Chief Staff Counsel with the ACLU's National Prison Project, states: "there is no real control [in the Section] right now; the positions taken in a given case seem to depend on who the lawyer [from the Section] is, and thus personal contacts are a key."[81] The old policy requiring prior approval for filing of all pleadings has been relaxed, although "higher level" pleadings still must be approved.[82] The end result has been, in general, a new focus on doing what is legally sound, rather than doing what is politically "correct." It should be emphasized, however, that the basic approach of the Department of Justice has not changed — exhaust all avenues of negotiation prior to the institution of any litigation under CRIPA.[83] Unfortunately, this policy tends to undermine the congressional intent behind CRIPA.[84] Although there are indications that the Special Litigation Section may take more liberal positions in the future, the continuing policy of negotiation without litigation, while reducing the judicial caseload, does little to protect prisoners' rights.

V. Certification Activity under CRIPA

It was Congress' hope that section 1997e's certification process would result in the resolution of prisoner complaints through institutional procedures fair and attractive to inmates, thereby providing a more efficient means to resolve valid grievances while minimizing the number of section 1983 inmate suits.[85] Unfortunately, this goal has not been realized. As of mid-1989, only seven states had grievance procedures certified by the Attorney General; six states and the District of

Columbia had been denied certification; and five states had certification files classified as "inactive."[86]

While those states which have successfully completed the certification process report satisfaction with their grievance procedures,[87] several reasons exist why more states have not joined the list of certified states.[88] Some states believe section 1997e only invites federal intrusion into state matters. Other states believe that the potential benefits arising from certification are outweighed by the costs of formulating and implementing a procedure complying with section 1997e's "minimum standards." The advisory role in the operation of the grievance system granted to inmates under section 1997e(b)(2)(A) is viewed as particularly burdensome. Still other states believe that their grievance systems are already fair and accurate, with few inmates instituting section 1983 claims as is. Finally, some states have simply given up on the certification process due to inaction by the Department of Justice on applications submitted by states in good faith. In the case of Wisconsin, the former director of the state correctional system reports that he was told by DOJ that the certification program "was dormant due to a lack of staff."[89]

VI. Congressional Oversight of CRIPA

Since President Bush took office there has been no congressional oversight of Department of Justice enforcement of CRIPA.[90] This contrasts significantly with fairly rigorous congressional scrutiny of CRIPA enforcement during the tenure of President Reagan and Assistant Attorney General for Civil Rights Reynolds.[91] According to House Judiciary Committee staff members, while CRIPA oversight hearings are "overdue," no action is planned for this Congress. In their words, "the loudest dog gets the bone" and right now civil rights groups are directing their "barking" at the 1990 Civil Rights Act.[92] Civil Rights groups such as the National Prison Project have not put any pressure on Congress to conduct oversight, largely due to a fundamental skepticism about administrative remedies and resignation arising from DOJ's past obstructionist position.[93]

Congress' sole action with respect to CRIPA in the last two years has been to commission and participate in the Federal Courts Study Committee.[94] The primary goal of the Committee was to make recommendations to "prevent the [federal judicial] system from being overwhelmed by a rapidly growing and already enormous caseload."[95] Thus, recent judicial and legislative attention to CRIPA has focused on reducing the number of prisoner-initiated cases, not on protecting prisoners' civil rights.

The Committee recommends amending section 1997e by: (i) directing federal courts to require exhaustion of state administrative remedies for 120 days instead of the current 90 days, if the court or the Attorney General is satisfied that the remedies are "fair and effective;" (ii) and deleting section 1997e(b)'s federally mandated minimum standards for state institutional remedies.[96] These recommendations can be criticized on several grounds. First, there are numerous reasons why more states have not presented plans to the Attorney General for certification, only one of which is the existence of section 1977e's "minimum standards."[97] Second, replacing the certification process with a judicial determination as to whether a grievance system is "fair and effective" may actually *increase* the burden on federal courts.[98] Courts would be required to review the minutiae of prison regulations and procedures before adjudicating the merits of a dispute. Third, *pro se* prisoners trying to gain relief from the federal courts "are ill-equipped to explain to federal judges why a grievance system is not 'fair and effective.'"[99] Imposing yet another judicial hurdle in the path of *pro se* prisoners may discourage the filing of legitimate complaints because it ignores the tendency of the legal system to "grind down" prisoners who have legitimate complaints. Fourth, eliminating the "minimum standards" requirement would create a procedural barrier to claims without reference to the likelihood that the particular case can be resolved in the defendant state's grievance system. Since most grievance systems disallow multi-party grievances, the amendment would impact negatively on the filing of class actions which "are of critical importance to assuring the rule of law in prisons."[100] Prisons in forty-three states as well as the District of Columbia, Puerto Rico, and the Virgin Islands are operating under court orders and consent decrees reached as a result of such class actions.[101] Additionally, the 120-day exhaustion requirement would moot most injunctive and declaratory claims for prisoners in jails who are typically held for short periods of time, and would preclude emergency injunctive relief requests by inmates in prisons.[102]

Finally, it may very well be that the only problem with section 1997e as it now stands is the lack of attention given to the certification process by DOJ. Congressman Robert Kastenmeier, a leading House supporter for prisoners' rights, dissented from the Committee majority on this point:

> I am unconvinced, however, that deficiences in [CRIPA] are responsible for the relative absence of state plans now in place. Arguably, CRIPA has never been properly implemented by [DOJ]. In my home state of Wisconsin, for example, a plan was developed but never implemented, solely because [DOJ] never acted on Wisconsin's proposed plan. It may be that Congress needs to reassess the Act in light of the committee's criticisms, but I do not believe that the solution necessarily lies in Congress relinquishing to the courts all responsibility for ensuring the adequacy of the state plans.[103]

With Rep. Kastenmeier's defeat last November, the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, which has legislative oversight authority over CRIPA, is now headed by Rep. William J. Hughes. Whether the Study Committee Recommendations will become law is uncertain. It will be up to the new Subcommittee leadership to jumpstart both the states' and

DOJ's participation in the grievance procedures certification program.[104]

In any event, unless there is a groundswell of public attention given to prisoners' rights, the only hope for change in the near future depends upon the policies and philosophies to be enunciated by the Bush Department of Justice and John Dunne. A more zealous approach to prisoners' rights litigation would encourage states to join the certification program. A more responsive approach to certification applications would ease the need to resort to litigation.

Chapter XX

The Americans With Disabilities Act

by Bonnie Milstein

I. Introduction

On July 13, 1990, President Bush signed the Americans With Disabilities Act (ADA),[1] establishing a national mandate to end discrimination against people with mental and physical disabilities and facilitate their integration into the economic and social mainstream of American life. It sets enforceable standards and ensures that the Federal government plays a central role in enforcing these standards. The law thus represents a major advance in the civil rights of people with disabilities.

The ADA borrows key provisions from existing civil rights legislation. Congress was careful to base most of its provisions on Section 504 of the Rehabilitation Act of 1973.[2] Accordingly, the law both defines disability as broadly as possible and includes the obligation to provide a "reasonable accommodation" unless this would result in undue hardship on the operation of the business.[3] The ADA also incorporates the enforcement provisions of Title VII of the Civil Rights Act of 1964.[4]

The first of the ADA's five titles addresses employment and specifies that an employer, employment agency, labor organization, and joint labor-management committee may not discriminate against any qualified individual with a disability with regard to any term, condition or privilege of employment.[5] Title I goes into effect two years after July 13, 1990, covering all employers with 25 or more employees. On July 13, 1994, four years after the effective date, the law covers all employers with 15 or more employees.[6]

Title II of the ADA addresses public services, filling in whatever coverage gaps were left by Section 504. Title II specifies that no department, agency, special purpose district or other instrumentality of a state or local government may discriminate against a qualified person with a disability.[7] It includes specific requirements applicable to public transportation provided by public transit authorities[8] and it incorporates the enforcement provisions of Section 505 of the Rehabilitation Act.[9] The authority must also provide paratransit for individuals who cannot use mainline accessible transportation, subject to an undue burden limitation.[10] Title II takes effect 18 months after July 13, 1990, becoming law on January 13, 1992, except that all new buses purchased after August 13, 1990 are to be accessible.[11]

Title III applies to public accommodations. Expanding beyond the parallel provisions of the 1964 Civil Rights Act, the ADA covers the activities of 12 kinds of private entities "if the operations of such entities affect commerce:"[12]

1. Places of lodging
2. Establishments serving food or drink
3. Places of exhibition or entertainment
4. Places of public gathering
5. Establishments selling or renting items
6. Establishments providing services
7. Stations used for public transportation
8. Places of public display or collection
9. Places of recreation
10. Places of education
11. Establishments providing social services
12. Places of exercise or recreation[13]

The ADA prohibits each of these private enterprises from discriminating against individuals with disabilities in the full and equal enjoyment of goods, services, facilities, privileges, advantages and accommodations.

Physical modifications to existing structures must be made if they are "readily achievable," that is, "easily accomplishable and able to be carried out without much difficulty or expense."[14] Private enterprises must also provide auxiliary aids and services unless such provision would fundamentally alter the nature of the program or cause an undue burden.[15] However, all new construction and major renovations must include accessibility features that are described in guidelines to be published by the federal Architectural and Transportation Barriers Compliance Board.[16]

Title III also requires that private transportation services be available to people with disabilities.[17] This requirement applies both to vehicles and to the assistance some riders with disabilities may require from the operators and managers of private companies in order to benefit from the transportation service.

This title becomes effective on January 13, 1992.[18] It incorporates the enforcement provisions of Title II of the Civil Rights Act of 1964 and requires the Attorney General to prosecute pattern and practice cases. A private right of action exists with regard to violations under all titles of the Act.[19]

Title IV addresses telecommunications barriers. It requires that telephone services offered to the general public must include interstate and intrastate relay services so that individuals with hearing and speech disabilities have opportunities for communication that are equivalent to those of people who use voice telephone services.[20] Common carriers have three years to comply with the requirements of the statute and with the regulations to be issued by the Federal Communications Commission.[21] The FCC is required to issue regulations by July 13, 1991.[22]

Title V contains miscellaneous provisions.[23] These include a prohibition against retaliation and an explanation that the ADA is not intended to override any federal, state or local law that provides equal or greater protection to people with disabilities; that it is not intended to disrupt the current nature of insurance underwriting; that states are not immune from prosecution under the ADA; that attorney's fees are available under the Act; that specific federal agencies have technical assistance responsibilities; that wheelchairs shall be permitted in federally designated "wilderness areas"; that transvestism, homosexuality and bisexuality are not disabilities and that certain mental disabilities are not covered by the Act; that Congress and its instrumentalities are covered by the ADA; and that both the ADA and Section 504, by amendment, exclude coverage of certain persons currently engaging in the illegal use of drugs.

II. The Administration's Support for the ADA

There is no doubt that the ADA would not have been enacted without the support of the Bush Administration. However, that support was strongest when the general principle that people with disabilities should be better integrated into mainstream America was at issue.[24] When implementing that principle required lobbying in the Congress, especially when the business community and the most conservative members of Congress began to question expansion of the rights of all people with disabilities, the White House became silent.

For example, while a candidate, then Vice President Bush endorsed the original ADA legislation,[25] which required stringent accessibility features in all businesses, included all people with mental disabilities and imposed costs on business well beyond those in the legislation as eventually enacted. However, when Congress began its debate, the White House was slow to provide leadership either to move the bill or to retain the principles on which it was based.

In January 1989, key Senate sponsors redrafted the bill to facilitate its passage by conforming it more closely to Section 504 of the Rehabilitation Act.[26] Some of the changes included reducing the financial burdens that had been imposed to promote structural accessibility, modifying accessibility standards for transportation vehicles, and clarifying the definition of "qualified handicapped individuals." Although the White House had not asked for these changes, the Senators were led to believe that the Administration would approve the revised bill within a week. Instead, although the final draft was delivered to the White House in February, they did not approve the bill until August, whereupon the Senate Committee on Labor and Human Resources voted 16-0.[27]

Once the bill was on the Senate floor, the Administration failed to lobby against an amendment that struck at its heart. Senator Armstrong (R-CO) proposed allowing employers to exclude individuals with certain mental disabilities from the law's protections on "bona fide moral and religious grounds". That amendment served to underscore the need for the ADA, demonstrating the discrimination to which people with disabilities are subjected because of stereotypes about the source and the impact of disabilities. In effect, the amendment was designed to let employers refuse to employ people they believed unworthy because of their disabilities, making any determination of the individual's ability to perform the job unnecessary.

Instead of lobbying against the amendment, White House representatives waited until Senator Armstrong threatened a protracted and potentially fatal debate on the bill, and the sponsors of the bill were forced to negotiate. Even then, it was the Senate sponsors, not the White House, who took the lead in convincing Senator Armstrong to limit the types of disabilities to be excluded by his amendment. As a result, for no rational reason, the ADA excludes people with 11 different types of mental disabilities.[28]

Indeed, once the bill reached the House, the White House refused to support it in any of the committee or floor debates and the never-ending conflict among the President's advisors resulted in confusion on the Hill. For example, when a proposed amendment in the Public Works Committee would have imposed lesser accessibility requirements on buses than the Department of Transportation had imposed for years through Section 504, White House lobbyists told House Republicans that the White House had no position on the issue. At the same time, White House policy staff told the disability and civil rights advocates that they supported incorporating the Section 504 requirements into the ADA. When the committee marked up the bill, Republican members voted against it, saying that the White House did not support the bill.

During consideration of the bill on the House floor, a conflict similar to that generated by the Armstrong Amendment erupted with introduction of an amendment by Congressman Jim Chapman (D-TX) concerning coverage of people who test positive for the HIV virus. The Chapman Amendment would have permitted employers to remove such employees from food-handling jobs.[29] Like Senator Armstrong, Representative Chapman did not hide the purpose of his amendment. He understood that the medical community, including the Center for Disease Control, believed that there was no possibility of communicating AIDS through food, and argued that his amendment was based not on reality but on perception. In other words, he sought to justify the very discrimination that the ADA was intended to eliminate.

Here, too, the civil rights and disability communities waited in vain for the White House to lobby against the amendment in a way consistent with President Bush's early and repeated support for the ADA's principles and goals. But the White House failed to send anyone to the floor debate in the House. Further, despite the Center for Disease Control's statements, a letter from Health and Human Services Secretary Louis Sullivan, and earlier White House statements opposing discrimination against people with AIDS, the Administration refused to take a position on the Chapman Amendment. In large part, the Chapman Amendments' passage is attributable to that.[30]

The most highly publicized of the conflicts emerged in the context of remedies for violations of the ADA. The controversy over the scope of remedies was tied to ongoing efforts to pass the Civil Rights Act of 1990.[31] Advocates for those with disabilities urged that remedies for discrimination under the ADA should be consistent with remedies for minorities, women and others protected under Title VII of the 1964 Civil Rights Act. The White House strongly lobbied for more limited remedies for people with disabilities. Although the Administration did not prevail, its veto of the Civil Rights Act of 1990 leaves inconsistencies between remedies available for different classes of victims of discrimination.

Even the ADA signing ceremony was marked by a sharp distinction between the President's rhetoric and his actions. At first, factions within the White House insisted that the ceremony be limited to a minimal number of people with disabilities. This was because some Administration officials believed that people with disabilities might generate more medical emergencies during a signing ceremony than usually occur, and they did not think that it would be possible to obtain a sufficient number of ambulances to sit outside the White House during the ceremony. The disability and civil rights communities were shocked. The President was about to sign landmark legislation rejecting the stereotype that people with disabilities were sick, frail invalids whose medical needs justified their exclusion from mainstream America. At the same time, some White House staff believed that people with disabilities should be excluded from the White House lawn precisely because of that stereotype. Ultimately, the Administration agreed to the presence of more than three thousand participants with disabilities, making the ceremony one of the largest in the history of the White House.[32]

III. Conclusion

Several federal agencies are now drafting regulations to implement the ADA, and the Office of Management and Budget is requiring each to submit its draft for prepublication, cost-benefit review. Even though the ADA's language is exceptionally detailed, the regulations will be critical in determining whether the promise of the law will be fulfilled. How the regulations read will answer the question of whether President Bush's inconsistent support of the ADA was based on anything beyond than a political agenda. The question is appropriate in light of White House failure to back its rhetoric with lobbying muscle during the passage of the Act and the President's refusal to permit any of the congressional sponsors to appear with him at the signing ceremony.

Will President Bush restrain OMB's efforts to impose narrowly conceived cost-benefit analyses on the regulations? Will he ensure that the regulations meet their statutorily mandated publication deadlines? Will he permit the business community to revisit questions already resolved in Congress? Will he ask Congress to appropriate sufficient funds for the enforcement and technical assistance provisions of the Act? Until these questions are answered, it is not possible to reach any final conclusions about the Administration's support of this landmark civil rights legislation.

Chapter XXI

Civil Rights and Persons With Disabilities: The Department of Housing and Urban Development

by Robert S. Ardinger

I. Definition of the Problem/Evidence of Discrimination

The effect of many years of housing discrimination against people with disabilities results as much from the widely held stereotypes that such people belonged in nursing homes and institutions as from hostility and fear. Shortly before *One Nation* went to print, two events sparked the hope that housing consumers with disabilities would both face less discrimination than they had and that the Department of Housing and Urban Development would initiate an energetic defense of their rights. Those two events were HUD's publication of regulations to implement Section 504 of the Rehabilitation Act of 1973[1] and the passage of the Fair Housing Amendments Act, both in 1988.[2]

While both events have resulted in more public awareness of what constitutes housing discrimination against consumers with disabilities and a more forceful effort on HUD's part to enforce the civil rights laws, HUD's actions, especially with regard to enforcement of Section 504 has been minimal, at best. For example, HUD's Office of Fair Housing and Equal Opportunity has only fractionally increased the staff assigned to implement Section 504. One small branch of the organization is assigned to this task, and this branch has, in addition to a branch chief who was only recently hired in August of 1990, only four staff who work on Section 504 issues and oversee a nation-wide implementation mandate. The branch is experiencing a considerable backlog of Section 504 complaints and compliance reviews. In addition, HUD program handbooks and regulations continue to be out of date and in conflict with Section 504 and the Fair Housing Amendments Act.

There has been little effort to provide training or technical assistance to HUD recipients beyond a series of "Section 504 Town Meetings." While the Town Meetings have been useful, many recipients can not attend the meetings due to limited budgets. The Section 504 regulation outlines a number of time periods under which recipients are expected to bring their programs into compliance, conduct self-evaluations and prepare transition plans, or carry out needs assessments.[3] The deadlines for completing many of these requirements have passed, yet HUD's Fair Housing Office has no action plan or even a requirement that recipients submit the plans to HUD for review.

II. Statement of Governing Laws

A. THE REHABILITATION ACT OF 1973

Section 501 of the Rehabilitation Act[4] requires federal agencies to adopt affirmative action plans for the hiring, placement, and advancement in employment of employees with disabilities. In the Fall of 1989, an EEOC management review identified several problems in the Department's affirmative action efforts. Recommendations included establishment of an EEO Committee to focus on disability issues; creation of a clear policy and procedure for providing reasonable accommodation to the Department's employees who have disabilities; and other recommendations. To date, this committee still has not officially been formed, and the Department continues to lack a policy and procedure, let alone staff, who can provide guidance on reasonable accommodation. Many HUD staff have experienced only frustration in their efforts to secure reasonable accommodation as not a single office or individual within HUD has this responsibility.

Section 504[5] prohibits the use of HUD funds for activities which result in discrimination against people with disabilities in employment, in the provision of benefits, or opportunities to participate in any programs or activities. Although Congress amended the law in 1978 to add federally conducted programs to programs which were federally assisted, HUD still has not promulgated final regulations. Recently, in July of 1990, a draft rule was circulated to key HUD offices for clearance, and was still in clearance in late January 1991.

B. ARCHITECTURAL BARRIERS ACT

The Architectural Barriers Act[6] has received even less attention than Title V of the Rehabilitation Act. HUD's Assistant Secretary for Fair Housing and Equal Opportunity is a voting member of the Architectural and Transportation Barriers Compliance Board (ATBCB), and the Director of the Office of HUD Program Compliance, who has managerial oversight of the Section 504 Branch, is HUD's Architectural Barriers Officer. In spite of this, little or no staff time is allotted to ABA complaints, or to efforts to ensure that recipients covered by the law are aware of its requirements.

For example, the Architectural Barriers Act requires every building built by or on behalf of the United States to be designed, constructed or altered in accordance with prescribed standards so as to be accessible to, and usable by, individuals with disabilities. Although HUD is one of four agencies responsible for setting those standards, it has failed to meet its own standards for its national office. The ATBCB found that the inaccessibility of L'Enfant Plaza, which provides Metro and pedestrian access to HUD, is a violation of the ABA, and asked HUD to develop plans to remedy the situation.

HUD's Office of Administration had previously noted the violation in 1989 and had discussed budgeting renovations in either FY 90 or 91. In response to the recent notice from the ATBCB, HUD's Office of HUD Program Compliance has sent a memo to the Office of Administration asking for an update on the status of plans for renovations to the plaza entrance, but no final decisions have yet been made.

With regard to another accessibility issue, *One Nation* noted that former Secretary Pierce had concluded that the ABA did not apply to any buildings built or leased with Community Development Block Grant (CDBG) funds, a program through which HUD funnels millions of dollars every year.[7] To his credit, Secretary Kemp reviewed and reversed that position. However, the Department has yet to publish a Notice of Proposed Rulemaking in the Federal Register in order to make this important change effective.

C. SECTION 202 OF THE NATIONAL HOUSING ACT AND SECTION 8 OF THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

The purpose of Section 202,[8] as described in *One Nation*, is to assist private, nonprofit corporations or public agencies "to provide housing and related facilities for elderly or handicapped families."[9] Combined with the Section 8[10] and the voucher rental assistance programs, the Section 202 program has developed the majority of accessible living units in the country.

When drafting its Section 504 Regulations, HUD had the authority to define housing providers as recipients, and to make them aware of their non-discrimination responsibilities under the statute. Instead, the regulation treats participants in the Section 8 certificates and housing voucher programs as contractors rather than recipients. As the Department explained in the Preamble to the Regulation,[11] it believed that requiring such participants to assume the responsibility to make any renovations or other modifications might discourage them from even participating in these programs. Therefore, the primary responsibility for ensuring that participants do not discriminate on the basis of disability rests with the entity receiving the annual contributions from HUD, usually the public housing agency. The public housing agency is also responsible for encouraging participation in the program by owners having accessible units.

The problem, of course, is that while such private owners participating in the program are required to participate in a nondiscriminatory manner, they are not expressly subject to the requirements outlined in the regulation. Therefore, it appears that private owners could not be required to assume any costs to make units accessible, or undertake renovations just for the purpose of providing accessible units. Nor, given the tragic shortage of low income housing units in the country, is it likely that public housing authorities would pressure private providers to do much other than to offer their units to certificate and voucher holders. HUD has not announced, nor is there any indication, that HUD has conducted compliance reviews to determine how public housing authorities are complying with the 504 Regulation generally or with regard to this specific part. Nor, to the best of our knowledge, has HUD issued any further policy guidance on these issues.

It may be only through the Fair Housing Amendments Act that private owners participating in such programs cooperate to increase the availability of accessible units. Of course, under FHAA, the owner can not refuse to allow a person with a disability to make renovations to a unit to make it accessible, however, the cost would have to be borne by the person renting the unit.[12]

A disabled person, or family with a disabled family member, who is a certificate or voucher holder will have much more difficulty locating accessible housing (and often there are time frames within which the applicant is supposed to secure housing or they lose the certificate), and will be at a considerable disadvantage under these programs as compared to non-disabled participants. Public housing authorities may address the issue through the "needs assessment" required by Section 504,[13] but if it is determined that needs can not be met through existing programs—including Sec. 8 certificates and vouchers—the public housing authority has no power to force the private housing market to create more accessible housing in order to correct gaps. Rather, the public housing authorities' only recourse is to plan, in its transition plan, for meeting unmet needs through Federally subsidized programs.

The big question is, in view of the budget limits and the tendency not to fund new construction, can the needs be realistically met through HUD programs available to the public housing authority? Public housing authorities have expressed concern that much of their housing stock cannot be readily made accessible through rehabilitation as the buildings are very old and architecturally limited—and accessibility often cannot be achieved without moving load-bearing members, something which the Section 504 regulation states would not have to be done.[14]

III. HUD's Role in Shaping the Law

A. POLICIES PROMOTING SEGREGATION AND INTEGRATION IN THE SECTION 202 PROGRAM

One Nation discussed at length the changes in interpreting the qualification standards of the 202 program from the Carter Administration to the Reagan Administration.[15] Briefly, the change promoted the concept that the name of one's disability determined whether or not a 202 sponsor was required to accept the applicant, not whether the applicant's needs met the services and structure provided by the sponsor. As a result of the change in interpretation, as is discussed in *One Nation*, sponsors have been permitted to exclude applicants with "undesirable" disabilities, such as mental illness, regardless of the fit between the applicant's needs and the sponsors services.

Unfortunately, HUD has continued and reinforced this discriminatory policy. HUD now permits sponsors to restrict admission of eligible applicants with physical disabilities to the 10% of the accessible units, regardless of whether the applicant asks for or requires an accessible unit.

More recently, HUD has looked at whether 202 projects may be approved to serve individuals with a specific type of disability such as AIDS, or persons with visual impairments. When a sponsor in California submitted an application for HUD funds to develop housing for people with AIDS, HUD's initial rejection was based on part on their conclusion that such tenants would not meet the Section 202 requirement that the housing would "improve their ability to live independently."[16] HUD reached that conclusion based on the belief that once a person with AIDS was so sick that he or she needed assisted housing, he was not far from death and that, therefore, the housing would not "improve his ability to live independently.[17]

The sponsor sued HUD and HUD retracted its astonishing interpretation of the statute. Moreover, HUD correctly concluded that although projects may be limited to persons within the four categories, a project designated for people with physical disabilities but restricted to persons with AIDS would not be permissible as that would be favoring one handicap over another.

HUD and the plaintiffs in *Jonathan G. Moreau, Robert Roe, and Housing for Independent People v. Jack Kemp*[18] are currently in settlement negotiations. The terms of the settlement are likely to reflect that HUD will fund the project to allow people with AIDS to be admitted as residents as long as the project is open to any individual who has a physical impairment which results in a functional limitation in access to and use of a building or facility. The project may describe its program as addressing the special needs of people with AIDS and ARC as long as it advertises equally to the general population in the project's geographic area.

B. THE FAIR HOUSING AMENDMENTS ACT

When HUD issued its regulations implementing the Fair Housing Amendments Act, it expressly refused to address the myriad of questions involved in applying the Act to state and local zoning and land use ordinances and laws.[19] Instead, citing to the statute's requirement that all such issues be referred to the Department of Justice, HUD not only refused to issue any regulation but has also refused to publish any technical assistance or policy guidance on the subject.

This is particularly disturbing in light of two facts. First, HUD has reserved to itself the responsibility of investigating complaints concerning alleged zoning and land use discrimination before the complaints can be referred to the Department of Justice. Second, HUD has decades of experience, through the Section 202 program and the more recent McKinney program, of the ways in which neighbors, zoning boards, and local elected officials have refused to permit community residences of adults and children with disabilities from locating in neighborhoods other than industrial and commercial ones.[20]

As a result, the law concerning the rights of people with mental disabilities to form a family-like living arrangement and to live in single family homes in residential neighborhoods has developed piecemeal, through Justice Department and private litigation, and through the issuance of a number of State Attorney General opinions.[21] Some states, therefore, have read the Fair Housing Amendments Act to invalidate any local law which denies individuals or groups of individuals with disabilities from living anywhere they choose. Other states continue to treat community residences like commercial enterprises or like institutional settings. They continue to impose arbitrary dispersion requirements that result in the inability of both states and non-profit organizations from addressing, in a meaningful and integrated fashion, the housing needs of low income people with disabilities. HUD's failure to exercise leadership in this area of the law has unnecessarily slowed the law's development and has already resulted in conflicting judicial decisions.

IV. Recommendations

1. Design and staff the Fair Housing and Equal Opportunity Office (FHEO) in such a way as to maximize HUD's

resources in enforcing both Section 504 and the Fair Housing Amendments Act.

2. Increase the staff devoted to reviewing and resolving the growing backlog of Section 504 complaints.

3. Establish a unit within FHEO to address the Section 504 and Fair Housing issues in public housing particularly and in other HUD-subsidized housing. At a minimum, the unit should require every public housing authority in the country to submit to HUD the evaluation and transition plans that are required by the 1988 regulations and that were due in 1989. FHEO should have sufficient staff and resources to evaluate the plans, to provide technical assistance, and to recommend appropriate enforcement action.

4. Establish a permanent liaison between FHEO and the Office of Public and Indian Housing to ensure that the policies, regulations, technical assistance information, and funding consistently supports and promotes the mandates of Section 504 and the Fair Housing Amendments Act.

5. Ensure that conciliation agreements and other resolutions of combined Fair Housing and Section 504 cases comply with the requirements of both statutes.

6. Include staff with disability expertise to work on Fair Housing complaint and compliance matters.

7. Issue Option One of the proposed Fair Housing Accessibility Guidelines immediately.

8. Issue a Notice of Proposed Rulemaking immediately to effectuate the applicability of the Architectural Barriers Act to Community Development Block Grant funds.

9. Amend all of HUD program regulations to conform to the mandates of all of the applicable civil rights statutes.

10. Withdraw the Section 202 policy statements which permit housing sponsors to discriminate among disabilities.

11. Use the National Affordable Housing Act of 1990 to encourage the development of all possible varieties of low income housing for people with disabilities.

12. Fight for adequate funding for the development of low-income housing and modernization funds to address the housing needs of those who must otherwise live in institutions, nursing homes, hospitals, shelters, and on the street.

Chapter XXII

Rights of Institutionalized Persons With Disabilities

by Robert D. Dinerstein

I. Introduction

Under President George Bush, the Justice Department's enforcement of the rights of institutionalized persons with disabilities[1] has continued in most respects the disappointing record of the Reagan Administration. The Department has continued to enforce the Civil Rights of Institutionalized Persons Act[2] (hereinafter referred to as "CRIPA") sporadically, initiating few investigations, bringing few new lawsuits and settling those it has brought on less than adequate grounds. With the long delay in confirmation of a new Assistant Attorney General for Civil Rights, the Civil Rights Division has undertaken no new CRIPA initiatives to speak of. The Division's Special Litigation Section, which enforces CRIPA, has shown some increased aggressiveness in its efforts to enforce previously-entered consent decrees, but such aggressive enforcement remains the exception and not the rule. The Justice Department's relationships with advocacy groups for people with disabilities show some signs of improvement, though it remains to be seen whether any concrete results will come of that improvement. In sum, the Department of Justice has yet to demonstrate that it is ready to re-enter the dialogue concerning the rights of institutionalized persons with disabilities.

II. Previous Recommendations

In Chapter XXII of *One Nation, Indivisible: The Civil Rights Challenge for the 1990s*,[3] the Citizens' Commission published the following recommendations for the more effective enforcement of the rights of institutionalized persons with mental disabilities:

"V. Recommendations

1. The Attorney General must name an assistant attorney general for civil rights who is committed to vigorous enforcement of the rights of mentally disabled institutionalized persons.
2. The new assistant attorney general for civil rights must commit him or herself to full and effective enforcement of CRIPA and to a generous interpretation of the constitutional and statutory rights of institutionalized persons.
3. The new assistant attorney general for civil rights must commit him or herself to the use of litigation under CRIPA where necessary to vindicate the rights of institutionalized persons.
4. CRIPA should be amended in various respects to make it easier for the Justice Department to investigate and, if necessary, sue immediately to enjoin institutional conditions that are imminently life-threatening. The statute should also be amended to clarify that other federal agencies that provide funding to institutions should take into account the findings generated by the Justice Department's CRIPA investigations. Finally, the new Administration should consider ways, including amendments to CRIPA, that would enhance the involvement of mentally disabled persons and their advocates in the CRIPA negotiation and implementation processes.
5. The Justice Department should rediscover its links with public interest groups and other advocates for mentally disabled persons. To facilitate its own enforcement activities, the Justice Department should consider intervention in appropriate private civil rights actions seeking to remedy unconstitutional institutional conditions. Further, the Department should reconsider its opposition to intervention efforts into CRIPA litigation by private groups.
6. Finally, the Department of Justice must re-enter the dialogue with courts, advocates, and others over the nature and extent of the rights of institutionalized persons. The Department should be involved in appellate litigation that seeks to expand these rights, rather than seeking to contract them as it so often did in the Reagan Administration. In particular, the Department must reconsider its policy of eschewing community placement as a possible remedy for unconstitutional conditions."[4]

These recommendations may be broken down further as follows: (1) the need for leadership within the Civil Rights Division that is committed to and actively provides vigorous enforcement, through litigation if necessary, of CRIPA and other statutes or constitutional provisions that protect the rights of people with disabilities; (2) improved relationships with groups that advocate on behalf of this population; and (3) statutory changes in CRIPA that would facilitate the Justice Department's enforcement capabilities. This chapter will address the Department's efforts with respect to items (1) and (2), as there has been no discernible effort in either Congress or the Administration to pursue necessary changes in CRIPA.[5]

III. Enforcement of the Rights of Institutionalized Persons With Disabilities Through CRIPA

In its previous report, the Citizens' Commission recognized the clear need for the Justice Department to enforce vigorously CRIPA and other statutes or constitutional provisions that protect the rights of institutionalized persons with disabilities. Because the Assistant Attorney General for Civil Rights establishes the basic policy regarding and sets the tone for those enforcement efforts, the appointment of an individual committed to reinvigorating the Department's efforts in this area cannot be over-emphasized.

Unfortunately, one consequence of the delay in the appointment of a permanent Assistant Attorney General for Civil Rights[6] has been that the leadership of the Department's Civil Rights Division has failed to undertake any new initiatives in enforcing CRIPA. Most significantly, since the Bush Administration took office, the Civil Rights Division has filed only one new CRIPA case concerning the substantive rights of institutionalized persons with disabilities.[7] Between September 30, 1987, and September 30, 1989, the Division initiated only four new investigations of mental health facilities, and no new investigations of mental retardation facilities.[8] Of the two mental disability cases that were being litigated as of the Citizens' Commission report, one was subsequently settled and the other dismissed.[9] At present, the Department is apparently actively litigating only one pre-judgment mental disability case under CRIPA.[10]

With approximately eleven mental disability consent decrees still in effect,[11] the Justice Department is faced with the responsibility of monitoring defendants' compliance with those decrees if they are to become something more than paper victories. The Department's enforcement efforts vary, demonstrating surprising aggressiveness in some cases and prolonged delay in others. In some cases, the Department's enforcement efforts have been stymied by courts that have disagreed with its interpretations of consent decrees. Enforcement problems have been caused both by the Department's passivity in monitoring consent decrees or agreements and the vague nature of the standard consent decrees themselves.

The Department has taken by far its most aggressive enforcement posture in *United States v. Oregon*. The 1989 consent decree concerning the Fairview Training Center contains many of the problems apparent in previous Justice Department decrees:[12] defining professional judgment to include actual departures from professional judgment;[13] retaining the then-current staffing ratios without an indication of their adequacy;[14] limiting judicial enforcement of the plan of implementation to only those provisions deemed to implicate constitutional and statutory standards;[15] and placing the burden on the United States to demonstrate the state's failure to achieve compliance with the decree rather than on the state to show compliance.[16] But the consent decree varies from the norm in responding, at least rhetorically, more favorably to community placement issues[17] and providing for an advisory expert panel to assist in monitoring the decree and the plan designed to implement it.[18] In June 1990, the Justice Department filed a motion for emergency relief to force defendants to comply with their plan of implementation. The Department's main concern was that defendants were not providing effective training programs for residents who had severe behavior problems and were not ensuring the residents' safety and protection from harm.[19] The magistrate referred the matter to the advisory panel, which agreed with the Justice Department that defendants were in non-compliance with the decree, although it disagreed with the compliance timelines urged by the Department.[20] Significantly, the Panel agreed with the Department on two key substantive issues: acceptance of a broader definition of residents with severe behavior problems than the state proposed and recognition that active programming was necessary to extinguish residents' maladaptive behaviors.[21] Under the terms of the consent decree, the Panel's recommendations are subject to court review. On September 22, 1990, the district court adopted the Panel's recommendations verbatim.[22]

The Justice Department has also shown commendable tenacity in one of its few remaining active pre-CRIPA cases, *Evans v. Barry*, a case concerning conditions at the District of Columbia's Forest Haven mental retardation facility. The Forest Haven case, originally settled among private plaintiffs, plaintiff-intervenor United States and defendants in 1978, called for the drastic reduction of the facility's resident population as well as measures designed to improve the institution while deinstitutionalization proceeded.[23] After many years of delayed compliance and missed deadlines, the Justice Department joined in July 1989 with private plaintiffs in seeking a contempt finding against defendant officials. The Department focused on institutional deficiencies, such as substandard medical care, rather than on delays in outplacement of Forest Haven residents, but significantly did not oppose plaintiffs' emphasis on the latter provisions of the consent decree. In other cases, the Department has been notoriously resistant to relief designed to increase the pace of (or even require) community placement from large, congregate institutions. As a result of the plaintiffs' and Justice Department's motions, the district court held the defendants in contempt and defendants have now agreed to close the facility no later than September 1991.[24]

The Department's efforts to enforce consent decrees in other cases have been less successful. In Connecticut, the Department filed a motion to enforce the decree, which the court denied.[25] In other instances, the Department's enforcement efforts appear to be substantially delayed.[26] Delays or difficulties in establishing compliance with court orders are not unique to the Department's cases, but they do belie its oft-repeated assertions that its conciliatory approach to investigations will result in more expeditious relief to the residents of state mental institutions.[27]

But the most serious setback to the Department's efforts occurred in *United States v. Massachusetts*,[28] its case against the Worcester State Hospital in Massachusetts. The Justice Department had filed the *Massachusetts* case in 1985, and agreed to a consent decree with the defendants after one week of trial.[29] In Section 4 of the consent decree, defendants were required to submit a plan of implementation, indicating how they would comply with the consent decree's general objectives. But Section 5 of the decree stated that the state could determine the specific means of achieving compliance with the decree.[30] Subsequent to the entry of the decree, defendants submitted their proposed plan of implementation. The United States objected to the plan; in particular, it alleged that the plan was devoid of the detail required by the consent decree. The defendants did have a more specific plan available, but argued that the consent decree did not require that such a plan be submitted to the United States for its comments and to the court for its approval. The district court agreed, and the court of appeals affirmed, concluding that the language in the consent decree was ambiguous and that therefore deference to professional judgment was appropriate.[31] The result is that the defendants have committed themselves in the consent decree (commitments that would be backed up by the court's contempt power) to only vague statements of compliance, and have succeeded in making the United States's efforts to enforce the rights of the institutionalized persons in Worcester State Hospital incomparably more difficult than if the detailed plan was submitted pursuant to the consent decree.

The district court and court of appeals decisions may be criticized for their narrow view of the nature of relief in institutional reform litigation. But the *Massachusetts* result is also the foreseeable consequence of a Justice Department consent-decree process that often goes out of its way to express deference to state officials and that eschews reference to specific implementation steps in the consent decrees themselves.[32] Even courts have criticized the Department for the vagueness of its consent decrees and the interpretation problems such vagueness creates.[33]

For the most part, however, the Department has not sought to enforce CRIPA through consent decrees but rather has conducted investigations that for a variety of reasons have not resulted in court-ordered agreements between the parties. As noted in the Citizens' Commission's initial report,[34] the most striking feature of the Justice Department's investigations is the long delay in obtaining solid, measurable results or even getting access to the facilities themselves. For example, the Department initially notified Massachusetts officials of unconstitutional conditions at the Westboro State Hospital on December 1, 1986. It was not until October 1988 that the Department completed two expert tours of the facility and notified state officials of additional deficiencies. As of September 1989, the Department was still negotiating with state officials about the deficiencies.[35] In another investigation, the Department initiated its investigation of Great Oaks Center in Silver Spring, Maryland, on November 18, 1986. As of September 1989, almost two years later, the Department had not yet managed to complete the preparation of its letter advising the state officials of their findings.[36] Investigations of other mental health and mental retardation institutions show a similar pattern.[37]

Two other investigations are particularly noteworthy for what they reveal about the limitations of the Department's non-litigation approach. One of the most egregious examples of the Department's investigatory delay was in Atascadero State Hospital in California, discussed in the Citizens' Commission's first report.[38] As of September 30, 1987, the last CRIPA report available at the time of the Citizens' Commission report, over five years had elapsed since the initiation of the Department's investigation. In the two years since the FY 1987 report, the Department has continued to monitor conditions at the facility and has re-toured with experts, but still has not entered into any enforceable agreements with state officials.[39] In Oregon, the Department put an investigation of the Eastern Oregon Developmental Center on hold for over two years because state officials claimed they were busy responding to the Department's investigation of Fairview Training Center.[40] Whether this delay was the result of state intransigence or Department acquiescence, it must have been small comfort to the residents of the institution.

Another serious problem is when the Department of Justice decides not to investigate an apparently substandard institution, or delays a decision to investigate such a facility for an inordinate length of time. An apparent recent instance of such a problem has occurred with respect to the Boswell Retardation Center in Mississippi. Although two different attorneys have supplied the Department with information concerning allegedly serious deficiencies at the facility, the Department has not taken any action for over one year.[41]

To be sure, some of the Department's investigations have resulted in what the Department at least claims have been satisfactory improvements in the facilities in question.[42] But the overall picture remains as it was at the end of the Reagan Administration: the Justice Department has far from regained its position as the principal entity enforcing the rights of institutionalized persons with mental disabilities.

IV. Relationships With Advocacy Groups

During the eight years of the Reagan Administration, relationships between the Justice Department and groups that advocated on behalf of people with mental disabilities steadily deteriorated to the point where there was virtually no dialogue between them. While there have been few concrete indications of change, there are some signs that the relationship may be ready to thaw. On the other hand, there is at least one example of what one advocate believes is the Department's failure to engage in sufficient consultation with local advocacy groups.

Once again, the delay in appointment of a permanent Assistant Attorney General for Civil Rights has made it difficult to assess the nature of the relationship between the Justice Department and the various advocacy groups in the mental disability community. Prior to John Dunne's appointment there were few initiatives either from the Department or the advocacy community. But one hopeful sign was a meeting that occurred in June 1990 between members of the National Association of Protection and Advocacy Systems' legal committee and Assistant Attorney General Dunne. At the meeting, the advocates urged the new assistant attorney general to review the policies of Wm. Bradford Reynolds, and argued that the limitations on remedies that Reynolds imposed on the Civil Rights Division were neither required by law nor wise policy.[43] While substantive changes in Department of Justice policy have yet to emerge from the meeting, advocates are "cautiously optimistic" that the new administration will be more favorably disposed than its predecessor towards recognizing the rights of institutionalized persons with disabilities.[44]

Another positive sign is that some lawyers representing persons with mental disabilities in lawsuits where the Justice Department is a party have spoken favorably of the Department's role in those cases. In both the *Evans* and *United States v.Oregon* cases, attorneys for class members have praised the Department's efforts, while recognizing the limitations that still affect the role the Department is willing to play.[45]

The picture is not entirely rosy, however. Private plaintiffs sued officials responsible for operating the Los Lunas Hospital and Training School in New Mexico. According to the attorney for the plaintiffs,[46] plaintiffs shared substantial information with the Justice Department in an effort to get the Department to enter the case. The Department began a CRIPA investigation of Los Lunas but did little to cooperate with the plaintiffs. Within one month of the scheduled beginning of trial in October 1989, the Justice Department informed the plaintiffs that it was conducting negotiations with the state officials in charge of Los Lunas. The Department discussed intervening in the plaintiffs' lawsuit, but when the plaintiffs' attorney indicated that he was not interested in the Department's intervention if it was solely going to focus on improvement of institutional conditions (rather than community placement), the Department attorney indicated that it might seek to intervene anyway. Trial then commenced. After the trial had gone one week, the Justice Department filed a complaint and simultaneous consent decree with defendants, thereby potentially undercutting plaintiffs' position in the lawsuit. It is not necessary to believe that the plaintiffs' arguments in the case were the correct ones to conclude that at a minimum the Department showed little interest in coordinating its efforts with a group that supposedly was also focused on improving the lot of the people in the Los Lunas institution.[47] A more coordinated litigation strategy might well have yielded more effective results for the residents of Los Lunas.

VI. Conclusion and Recommendations

As with its rhetoric in general, the Bush Administration's efforts in the area of the rights of institutionalized persons with mental disabilities have been low-key and less confrontational than those of the Reagan Administration. Nevertheless, while some hopeful signs appear on the horizon, it is time for the Department to step up its CRIPA enforcement efforts and deliver on the promise that the statute represents to the residents of this nation's institutions. As the Administration reaches its halfway point, that promise has too long gone unfulfilled.

Because so little has changed with respect to the Justice Department's enforcement of the rights of institutionalized persons with mental disabilities, it is appropriate to restate the recommendations that appeared in the Citizens' Commission's first report, changed only slightly to reflect the appointment of John Dunne as Assistant Attorney General for Civil Rights:

1. The new assistant attorney general for civil rights must commit himself to full and effective enforcement of CRIPA and to a generous interpretation of the constitutional and statutory rights of institutionalized persons with mental disabilities.

2. The new assistant attorney general for civil rights must commit himself to the use of litigation under CRIPA where necessary to vindicate the rights of institutionalized persons with mental disabilities.

3. CRIPA should be amended in various respects to make it easier for the Justice Department to investigate and, if necessary, sue immediately to enjoin institutional conditions that are imminently life-threatening. The statute should also be amended to clarify that other federal agencies that provide funding to institutions should take into account the findings generated by the Justice Department's CRIPA investigations. Finally, the Administration should consider ways, including amendments to CRIPA, that would enhance the involvement of persons with mental disabilities and their advocates in the CRIPA negotiation and implementation processes.

4. The Justice Department should rediscover its links with public interest groups and other advocates for people with mental disabilities. To facilitate its own enforcement activities, the Justice Department should consider intervention in appropriate private civil rights actions seeking to remedy unconstitutional institutional conditions. Further, the Department should reconsider its opposition to intervention efforts into CRIPA litigation by private groups.

5. Finally, the Department of Justice must re-enter the dialogue with courts, advocates, and others over the nature and extent of the rights of institutionalized persons with mental disabilities. The Department should be involved in appellate litigation that seeks to expand these rights, rather than seeking to contract them as it so often did in the Reagan Administration. In particular, the Department must reconsider its policy of eschewing community placement as a possible remedy for unconstitutional conditions.

Chapter XXIII

Reauthorization and Revitalization of U.S. Civil Rights Commission

by John C. Chambers, Jr., and Kamela S. Stroman

I. Introduction

At the close of the Reagan Administration, the Civil Rights Commission was in disarray, with more attention focused on backbiting between the Commissioners than on substantive issues.[1] The position of staff director had remained open since 1986, and some felt the Commission's useful life might have come to an end. The Citizens' Commission on Civil Rights called upon President Bush to provide positive leadership for the Civil Rights Commission. While Bush's initial offerings on the Civil Rights Commission were more talk than action, Bush refused to let the Commission die, and he has recently made appointments that may have placed the Commission on the road to recovery.

II. Early Controversy

Controversy, which followed the Commission after President Reagan fired three Commissioners in 1983 and replaced them with commissioners who opposed busing and affirmative action,[2] flared up again early in the Bush administration. William Barclay Allen, then the Commission's chairman, was briefly held by sheriff's deputies for kidnapping after he took a 14-year-old Apache girl off a school bus to ask her if she felt her civil rights had been violated. Allen was investigating an adoption case in which the girl had been returned to her natural mother.

A March 21, 1989, *New York Times* editorial called Allen's lapse in judgment a chance for the President to designate a new chairman, elaborate his view of the agency's mission, and work with Congress to restore some of its funding.[3] That same day, White House officials announced that the President was considering appointing longtime friend Arthur Fletcher to the Commission. Two days later, however, the *Times* reported that Allen (whose term would not expire until 1992) had no intention of resigning, and presidential spokesman Marlin Fitzwater denied that the Bush administration was trying to force Allen off the Commission.[4] Allen subsequently sent a formal apology to the Arizona Indian tribe and continued in his capacity as chairman.

Chairman Allen again stirred controversy in early October of 1989 when he spoke against anti-discrimination laws for specific ethnic or minority groups at a symposium on Homosexuality and Public Policy Implications sponsored by the California Coalition for Traditional Values.[5] Allen's speech, entitled "Blacks? Animals? Homosexuals? What is a Minority?" evoked a protest outside the Pan-Pacific Hotel in Anaheim.[6] Allen's speech linked blacks, animals, and homosexuals by saying that arguments have been made to give each group special status, and Allen argued that no group should get such a preference.[7] Even before Allen gave the speech, the Civil Rights Commission voted 6 to 1 to rebuke him for planning it.[8]

The controversy over Allen's speech may have led the President to accept Allen's resignation as chairman of the Commission (but not his seat on the Commission). Upon Allen's resignation, Murray Friedman, the Commission vice chairman, became acting chairman. At that time, Friedman's term and the Commission itself were both near expiration.

III. Reauthorization

During a White House ceremony commemorating the 25th anniversary of the civil rights movement on June 30, 1989, President Bush called upon Congress to join him "in a new partnership to reauthorize the Civil Rights Commission, with the goal of launching a renewed civil rights mission."[9] The House Subcommittee on Civil and Constitutional Rights of the Judiciary Committee had begun reauthorization hearings in April of 1989.[10] In spite of this early start, the Civil Rights Commission Reauthorization Act of 1989 was not approved until November 28, 1989, two days before the Commission's expiration date.

A. HOUSE BILL

When the House began debate on reauthorization of the Commission, the bill before the representatives provided for only a six-month extension of the Commission's life.[11]

Representative Don Edwards, a Democrat from California and chairman of the Subcommittee on Civil and Constitutional Rights, explained that although there was a "clear consensus on both sides of the aisle, that this Nation needs a strong, independent, credible and effective Civil Rights Commission," no one had presented the Subcommittee with a clear plan of how to bring this about during the reauthorization hearings.[12] Therefore, Edwards proposed the six-month extension to give the Subcommittee time to study four proposals to revitalize the Commission, which had been submitted during the preceding month. The bill also proposed to take the power to appoint the staff director of the Commission away from the President.

The Bush Administration's proposal, which was not presented until November 8, called for a six-year extension of the Commission, the same length as the previous authorization period. The Administration opposed the proposed six-month reauthorization on the basis that such a limited time period would make it difficult to fill Commission seats. The Bush proposal also allowed the President to retain the power to appoint a staff director for the Commission. Notwithstanding the President's threat to veto the bill if the Administration's proposal was not adopted, the House passed the Edwards bill, including the change in appointment power, 278 to 135.[13]

B. SENATE BILL

Like the House, the Senate also faced a time crunch in deciding how to reauthorize the Commission. In an effort to speed passage of the reauthorization legislation, Senator Paul Simon introduced a bill identical to the one Edwards introduced in the House.[14] It provided for a six-month extension of the Commission's term and placed the power to appoint the staff director in the hands of the Commission. Senator Simon said the six-month extension would give Congress time to find a workable solution to the Commission's problems, which stemmed from a lack of credibility and a series of partisan appointments.[15] On the same day, Senator Hatch introduced a bill proposing the six-year reauthorization preferred by the President.[16]

C. THE COMPROMISE

After these bills were introduced, a bipartisan agreement was reached. The Administration, through Roger Porter of the President's Domestic Council, was "heavily involved" in working out the compromise, which ultimately provided for a 22-month extension of the Civil Rights Commission.[17] The compromise bill dropped the section concerning the Commission's power to appointment of the staff director, thus the power remained with the President. It made no other changes in the Commission, and it did not allow the Commission to lapse so that an entirely new set of commissioners could be appointed. It did, however, retain the provision allowing the President to remove a member of the Commission for neglect of duty or malfeasance in office.[18] The compromise bill continues the practice of appointing commissioners for six-year terms.[19]

In agreeing to the compromise bill, several House members warned that the Commission would be on probation during the extension period. Representative Edwards said that if the Commissioners did not do a good job they would "jeopardize their future existence."[20] Representative Sensenbrenner said that if the Commission, which would consist of four new Commissioners and four hold-over Commissioners, persisted in the same type of personality arguments the Commission had been engaged in for the previous four or five years, he would not support another extension of the Civil Rights Commission.[21] Thus, members of both political parties agreed that the Commission is on trial, with its future existence hanging in the balance.

IV. Appointments

The Congressmen also agreed that quality presidential appointments would be the key to turning the Commission around. Four Commissioners' terms expired in the last two months of 1989. Senator Simon called upon President Bush to use his two appointments to "reaffirm his commitment to civil rights and appoint distinguished individuals who can help restore the Civil Rights Commission as an independent agency dedicated to advancing the cause of equality."[22] Representative Edwards said the President should appoint persons of stature with an interest and expertise in civil rights, and he said the new Commission chair and vice chair should reflect the new spirit promised by the President.[23] John Sununu, the President's chief of staff, said in November that the President was "intent on appointing individuals to the board who will work effectively with the members appointed by the congressional leadership to meet the full promise encompassed in the commission's charge."[24]

The President and Congress have now filled all four of the open Commission seats, and the President has appointed a new staff director. President Bush's first move was to appoint Arthur A. Fletcher as Chairman of the Commission. Mr. Fletcher was one of the highest-ranking African-Americans in the Nixon Administration. He served as assistant secretary of labor to Nixon, and as a deputy presidential assistant for urban affairs under President Ford. Fletcher was an alternate delegate to the 26th session of the United Nations General Assembly in 1971, while Bush served as the chief United States delegate. Fletcher also served as executive director of the United Negro College Fund in the early 1970s. He said his first move as chairman would be a blanket review of every piece of civil rights legislation passed in the last 25 years, to determine its effectiveness.[25]

Mr. Fletcher had anticipated appointment the previous year when Chairman Allen was under fire, but it wasn't until February 23, 1990, that Fletcher moved into the chairman's seat. In response to reports that Fletcher was being considered to head the Commission, Senator Simon said the consideration of Fletcher was a signal that the administration might be serious about restoring the Commission's credibility.[26]

When Fletcher was named as chairman of the Commission, he said he hoped to return the Commission to its position as the "conscience of the nation."[27] His conviction to return the nation to its pre-Reagan civil rights agenda was underscored by his public pronouncements urging the President to support the Civil Rights Act of 1990, a measure that would effectively overrule several recent Supreme Court cases by strengthening protections against job discriminations on the basis of race or sex.

Civil rights groups generally praised the President's appointment of Fletcher, saying that by appointing someone with credentials in civil rights, Bush demonstrated sensitivity with reference to the Commission.[28] Some felt, however, that the Commission was still too conservative to regain its credibility.[29]

President Bush named Charles Pei Wang as his second Commission appointee, and designated him vice chairman of the Commission. A Democrat, Wang is the President of China Institute of America, Inc., an organization founded to help educate the public about Chinese culture. He was a member of the New York State Advisory Committee to the Commission on Civil Rights for several years in the 1970s.

At the Rose Garden ceremony in which President Bush announced Wang's appointment, he also welcomed the two other new appointments to the Commission. Carl Anderson was selected by House Minority Leader Robert Michel in February 1990 to serve a six-year term. A Republican, Anderson is Vice President for Public Policy of the Knights of Columbus, and dean, vice president and professor of family law at the North American campus of the Pontifical John Paul II Institute for Studies on Marriage and Family. Anderson served as Special Assistant to the President for Public Liaison and as a member of the White House Office of Policy Development during the Reagan Administration.

Russell Redenbaugh, an Independent, was appointed by Senator Robert Dole in February 1990 to a six-year Commission term. Redenbaugh is a partner and director of the investment management firm of Cook & Bieler, Inc., in Philadelphia. Redenbaugh was blinded and lost most of the use of his hands in an explosion at age 17, and he is the first disabled American to serve on the Commission. President Bush said in welcoming Redenbaugh that "physical disability will not be a barrier to service in this administration."[30] Althea T. L. Simmons, Director of the Washington Bureau of the NAACP, called the appointments of Redenbaugh and Anderson a move "in the right direction."[31]

President Bush filled the staff director position that had been open since 1986 by appointing Wilfredo J. Gonzalez on March 30, 1990. Before being appointed to the post, the Republican was associate director of Equal Opportunity and Civil Rights in the State Department. Gonzalez served in several positions with the Peace Corps from 1978 to 1984, including the post of country director in Ghana, West Africa, where he supervised all Peace Corps operations. As the associate administrator for minority small business and capital ownership development at the United States Small Business Administration from 1985 to 1988, Gonzalez directed the agency's efforts to assist minority business development.

V. Commission Action

It is still too early to tell whether the new appointments to the Commission will indeed be able to put the President's "lofty rhetoric"[32] into action. Although members of the House and Senate Judiciary Committees said after the reauthorization bill passed that they would have hearings in 1990 to determine the form and mission of the Commission,[33] they have now decided to see how well the Commission operates under the new appointees before calling for any changes in its structure. So far during the Bush Administration, the Commission published two reports in 1989. It has not yet had time to publish any reports since Fletcher's appointment. The review of all civil rights legislation passed in the last 25 years proposed by Chairman Fletcher when he took office still remains just an idea, because the Commission lacks sufficient funding to carry out such a major undertaking.

The Commission is currently involved in reviewing the Immigration Control and Reform Act and the Fair Housing laws, and in studying the economic status of women of Hispanic origins. The Commission plans studies of discrimination against the elderly and of voting rights laws in 1991. Additional projects have been proposed, and their undertaking will be dependent on whether the Commission has sufficient funding.

President Bush has called for a significant increase in the Commission's budget for 1991. The 1990 Commission budget of $5.7 million would be increased to $10.3 million in 1991 under the President's proposal. This request for an increase may be a gesture by the President intended to indicate his commitment to civil rights. It may also indicate a renewed confidence in the Commission, a confidence found to be warranted by a recent General Accounting Office review of the Commission. Although a 1986 GAO study found serious financial administrative management problems at the Commission, a recent review gave the Commission a clean bill of health.

With the new appointments, renewed direction, and the possible budget increase, the Bush Administration has given the Commission a much-needed stimulant. The near-death experience brought about by the policies of the Reagan administration appears to be in remission. Only time will tell whether the Commission is on the road to recovery or is destined for a post-Reagan relapse that will threaten its survival.

Chapter XXIV

Judicial Nominations: Continuing the Struggle for Equal Justice

by Jeffrey F. Liss and Karen L. Whitney

I. Introduction

While President, Ronald Reagan made an impression on the nature of the federal judiciary that may last for the next 50 years. His legacy is a judiciary reflecting an ultra-conservative ideology transcending mere partisanship.[1] President Reagan used his nomination power to further a conservative social agenda. Rather than seeking judicial candidates with a commitment to impartiality and equal justice, President Reagan used ideological purity as his primary criterion for nomination.[2] Consequently, the judicial appointment process under Reagan left the judiciary in retreat from equal justice and protection of civil rights.[3]

When George Bush became President, there was speculation about whether he would shift the judicial selection process to focus on impartiality and equal justice.[4] President Bush began slowly, nominating only 23 candidates in his first year. That effort stepped up considerably after January 1990, and as of the end of the 101st Congress in November 1990, the President had filled 70 judicial vacancies.[5] Thus far it appears that President Bush has continued President Reagan's tradition of nominating strong conservatives who construe laws narrowly, effectively reducing access to the federal courts.[6]

The continuation of the Reagan record of judicial appointments is of continuing concern to those who believe that an independent federal judiciary is necessary to protect the rights of our society's minorities and disenfranchised. A retreat from civil rights at this time may last well into the twenty-first century. As with President Reagan, a significant number of President Bush's nominees are young,[7] and some may remain in their life-tenured positions for nearly 30 years.

President Bush's most visible nominee has been David Souter, selected to replace William J. Brennan, Jr. on the U.S. Supreme Court. In the next two years, President Bush may well have the opportunity to make additional appointments to the Supreme Court. Moreover, with the passage of the Federal Judgeship Act, the President shortly will be filling eleven new circuit and 74 district court judgeships created by that Act. This will give President Bush a significant opportunity to make his mark on the ranks of the federal judiciary.

This chapter assesses the Bush Administration's judicial nominations' record. First, it describes the nomination procedures under Presidents Reagan and Bush, noting the similarities and differences between the two Administrations. Next, it describes the 1989 controversy over the role of the American Bar Association ("ABA") in the nominations process, and describes how the Senate Judiciary Committee has reacted to President Bush's nominees. It then reviews the Bush record in making nominations, focusing on his most controversial nominees. It also focuses on the current controversy over membership in discriminatory clubs. Next, this chapter reviews President Bush's only appointment thus far to the Supreme Court, David Souter. Finally, this chapter discusses the recommendations made in the previous report and suggests new ways to ensure diversity and competence in the federal judiciary.

II. A Comparison of the Nomination Procedures Under the Bush and Reagan Administrations

The Constitution vests in the President the power to nominate judges.[8] It also grants the Senate power of advice and consent.[9] Beyond these two powers, the selection process has become the function of politics and patronage. Under President Reagan, selection was contingent upon philosophical ideology. This section reviews the process thus far under the Bush Administration, as compared to President Reagan.

A. DRAFTING A LIST OF CANDIDATES

1. DISTRICT COURTS

The process of selecting a judge begins with the selection and screening of initial candidates. Under President Reagan, the candidates at the district court level were selected by "senatorial courtesy," a procedure in use for the past 150 years. Under President Reagan's version of this process, a senior Republican senator from the state with the vacancy would select a list of three candidates for the position.[10] The Justice Department then would select one of the three to be investigated and presented to the President.

The Bush Administration has continued this process. However, a feud has developed between the Justice Department and Republican senators over this policy. Senator Jeffords (R-Vt) has openly resisted the Justice Department's insistence that three names be suggested for one vacancy arguing that one name should be sufficient. This battle is expected to intensify in the future.[11]

2. THE CIRCUIT COURTS

The Reagan Administration reserved the prerogative to select candidates for the Circuit Courts of Appeal. The selection of these candidates was centralized in the Office of Legal Policy ("OLP") within the Department of Justice.[12] OLP picked candidates based on a review of their written work and recommendations from Congress or local bar leaders. OLP selections were carefully screened to ensure their adherence to the strict ideological standards espoused by the Reagan Administration. A list of satisfactory candidates was then sent to the Justice Department for investigation.[13]

The Bush Administration has continued in the Reagan tradition of reserving the prerogative to pick nominees for the Circuit Courts of Appeal. The exact criteria for selection is unknown. What is known is that the Administration has dismantled the Reagan Administration's OLP screening apparatus and that the selection of judicial nominees is currently controlled by Attorney General Richard Thornburgh and White House Counsel C. Boyden Gray.[14] These two admit that their aim "is to shift the courts in a more conservative direction."[15] Gray's deputy counsel, Lee Liberman, is heavily influential in selecting judicial nominees. Liberman, a former law clerk to Supreme Court Associate Justice Antonin Scalia, is reportedly devoted to strict constitutional interpretation.[16]

B. INVESTIGATION AND INTERVIEWS

Once a list of candidates for either court is compiled, a series of investigations occur to determine each candidate's worthiness for the bench.

1. THE JUSTICE DEPARTMENT

Under President Reagan, each candidate was investigated by the OLP and interviewed extensively. Based on these investigations and interviews, the Attorney General then chose one candidate to present to the President's Federal Judicial Selection Committee. If the Committee approved, the candidate's name would be sent on to the Federal Bureau of Investigation and to the American Bar Association's Standing Committee on Federal Judiciary for further investigation. If these groups approved, the name would be sent to the President to make the formal nomination.[17]

Under the Bush Administration, after the candidates are selected, they are screened at the Justice Department by a top Thornburgh aide.[18] The candidates are then interviewed by members of the Attorney General's office. The Solicitor General, Kenneth W. Starr, is also involved in the interviewing process.[19]

Candidates who have undergone the Bush Administration's interviewing process report that they experienced no obvious scrutiny of their ideology.[20] However, as to many circuit court nominees, it is likely that such questioning is unnecessary. Reagan's 290 district court appointments have created a "farm system" from which President Bush can choose circuit court candidates.[21] The ideology of these candidates is often readily apparent from their decisions. It is not necessary to interview them to discover where they stand.

2. AMERICAN BAR ASSOCIATION

Once a candidate has passed the initial scrutiny of the Justice Department, he or she is evaluated by the American Bar Association. The ABA's Standing Committee on Federal Judiciary reviews each candidate and rates him or her on their degree of qualification: not qualified, qualified, or well-qualified. The ABA has played an important role in selecting federal judges for nearly 40 years.[22]

However, the ABA has come under attack by conservative Republicans who view the ABA as an impediment to reshaping the federal bench.[23] The attack was most intense in 1987 when four of the 15 members of the ABA Federal Judiciary Committee rated Judge Robert H. Bork as not qualified to sit on the U.S. Supreme Court.[24] When George Bush became President in January 1989, Attorney General Thornburgh suspended the ABA's role in evaluating judicial nominees. The suspension was a result of ABA evaluation guidelines calling for consideration of political or ideological philosophy if it affected judicial temperament or integrity.[25] In June 1989, the Senate Judiciary Committee held a hearing where Senators vented their dissatisfaction with the ABA.[26] Following this hearing, the ABA agreed to delete from its guidelines any reference to consideration of political or ideological philosophy.[27] The ABA role in evaluating judicial candidates then resumed.[28] The attack was renewed again in February 1990 after the ABA House of Delegates voted to endorse a woman's right to choose to have an abortion, and to endorse the 1990 Civil Rights Act. After this announcement, four Republican Senators wrote to the Attorney General charging that the ABA had forfeited its "neutral, impartial role." Charles E. Grassley (R-Iowa), Orrin G. Hatch (R-Utah), Gordon J. Humphrey (R-N.H.), and Alan K. Simpson (R-Wyo.) requested that the ABA be eliminated from the selection process entirely.[29] While no action was taken, their complaint succeeded in keeping the ABA controversy alive. Since that time, the ABA, having even found certain controversial candidates "qualified," has been accused of becoming "chastened" and "cautious."[30]

III. Bush's Judicial Nominations Record

Since President Bush came to power in January 1989, he has nominated 69 candidates for 70 vacancies on the federal judiciary. This section assesses President Bush's record after two years[31] and examines several controversial nominees, including David Souter.

A. OVERALL RECORD OF NOMINATIONS

During President Bush's first two years in office he has continued the Reagan Administration legacy by nominating an overwhelming percentage of white, conservative, wealthy males to the federal judiciary.[32] In these two years he has submitted a total of 77 nominations — one to the United States Supreme Court, 23 to the circuit court of appeals, and 53 to the district and claims courts.[33] Of those nominated, 93% were white, 88% were male and 64% reported a net income of more than $500,000.[34]

It is not surprising, therefore, that nearly one-third of those nominated for federal judgeships had a significant professional relationship with the Reagan administration.[35] In fact, 13 out of 19 of Bush's nominations to the courts of appeals were Reagan appointees.[36] In April 1990, *The New York Times* noted that "the hundreds of Reagan appointees to the district courts have provided the Bush Administration with a kind of farm system from which to choose circuit court candidates."[37]

Despite President Bush's rhetoric that he intended to nominate more women and minorities to the bench, he has failed to do so. Of the 69 people the President has nominated to date, only three are black, two are Hispanic, and eight are women.[38] There have been no Asian appointees.[39] These numbers are quite similar to those of the Reagan Administration. For example, 4.3% of President Bush's nominees are black, compared to 2.1% of President Reagan's appointees. Only 11.6% of President Bush's nominees are women compared to President Reagan's 8.2%.[40] President Bush's record of 93% white nominees compares to 93.6% during the Reagan Administration.[41]

The lack of change in appointing women and minorities to the bench is particularly disheartening in light of the larger applicant pool available today. In 1980 there were 70,000 women lawyers and judges in the United States. Yet in 1989 that number more than doubled to 173,000. In addition, the minority applicant pool more than doubled from approximately 23,000 in 1980 to 51,000 in 1989.[42]

The Bush Administration's nominees have also been financially well-off: over one-third of those nominated are millionaires.[43] Moreover, 26 nominees belonged to exclusive clubs that practice or practiced discriminatory membership policies.[44] In addition, the nominees had meager records of *pro bono* experience in providing legal service to the disadvantaged.[45]

The table below compares the differences in racial and gender diversity between the appointments of Presidents Bush, Reagan, and Carter. The Carter record clearly demonstrates that the problem is not one of a limited pool from which to choose candidates.

Administration	Carter	Reagan	Bush
Total # of Nominations	258 appointees	402 appointees	6 nominees
Blacks	37 (14.3%)	8 (2%)	3 (4.3%)
Hispanics	16 (6.2%)	16 (4%)	2 (2.9%)
Women	40 (15.5%)	36 (9%)	8 (11.6%)
White men	165 (64%)	342 (85%)	56 (88%)

Source: Statistics compiled by People for the American Way.

President Bush's record to date suggests that the diversity that has come to the legal profession over the past 20 years has yet to be reflected in the federal judiciary. With the nearly 100 projected vacancies over the next two years, President Bush has the opportunity to change this record.

B. CONTROVERSIAL BUSH NOMINEES

Several of President Bush's nominees have been particularly controversial. These include David Souter, Kenneth Ryskamp, Clarence Thomas and Vaughn Walker.

1. DAVID SOUTER

With the July 1990 resignation of liberal Justice William J. Brennan, Jr., President Bush faced his first opportunity to appoint a Justice to the U.S. Supreme Court.[46] His nominee, First Circuit Court of Appeals Judge David Souter, encountered little opposition despite the fact that before his nomination, he was virtually unknown outside of New England.

While most presidents yearn for the chance to appoint a Supreme Court Justice, the mood at the White House reportedly was more anxious than joyful at the news of Justice Brennan's resignation.[47] The President and his aides worried that a bitter fight could be costly.[48] Therefore, they sought a nominee whose credentials would be appropriate, including a commitment to "judicial restraint" and "original intent," but whose views on controversial issues such as abortion might not be known.[49] After selecting Souter, President Bush emphasized his "keen appreciation for the proper role" of the courts in "interpreting, not making the law."[50]

The selection of a candidate for the Supreme Court had begun in the earliest days of the Bush presidency.[51] A list of

50 names prepared on Inauguration Day had been reduced to 18 names at the time of Justice Brennan's retirement.[52] White House Counsel Gray and Attorney General Thornburgh, along with their aides, examined and interviewed candidates on the list. Within a day of Brennan's resignation, the list had been reduced to eight: four front-runners and four backups.[53] By the following day, the decision was between Judge Souter and Fifth Circuit Court of Appeals Judge Edith Jones. Both were summoned to Washington where they were interviewed by President Bush.[54] Following hour-long interviews with each finalist, President Bush made the final decision.[55] There was speculation at the time that Souter was selected over Jones because he would be the less controversial to confirm.[56]

Souter's confirmation, in fact, occurred after thorough but uncontroversial hearings in September, 1990. Throughout the hearings, Souter responded to a number of questions about his judicial philosophy and his record on the New Hampshire Supreme Court. However, he attempted to draw a line and not answer questions concerning issues that might come before him once he took his place on the Supreme Court.

For example, Souter revealed that he ascribed to the jurisprudential theory of "originalism", under which judges should look to the intentions of the drafters of the Constitution and Bill of Rights when engaging in constitutional interpretation. In his view, however, "originalism" does not necessarily require the same analysis that might be required under the jurisprudential theory of "original intent" — the theory ascribed to by Judge Bork which limits constitutional inquiry solely to the intention of the framers. Souter indicated that his theory requires consideration of historical developments since the adoption of the Constitution and the Bill of Rights, and not rigid reliance on discerning the intentions of the framers who lived two centuries ago.

He also indicated that he accepted a constitutional right to privacy, although one had not been spelled out in the Constitution or the Bill of Rights. Yet at the same time, he refused to reveal whether he believed that the right to privacy extended to protect the right of a woman to terminate an unwanted pregnancy.

The hearings revealed little about Souter's views on civil rights. He did indicate support for *Brown v. Board of Education*, and he answered several questions concerning affirmative action. He noted that there would be a continuing need for affirmative action "for a longer time than I would like to say." On the same subject, however, he refused to acknowledge an earlier statement he had made in a speech that "affirmative action is affirmative discrimination," despite contemporaneous news clips reporting the speech. In response to a question from Senator Kennedy, he characterized his own statement that illiterate voters diluted the votes of other voters as merely a "mathematical statement." Both of these answers revealed an insensitivity to important issues of civil rights.

During the hearings, a number of women's groups voiced opposition to Souter's confirmation.[57] Souter was ultimately confirmed by the Senate by a vote of 90-9.

2. KENNETH RYSKAMP

Currently a district court judge in Florida, Kenneth Ryskamp is the most recent of Bush's controversial nominees. Judge Ryskamp was nominated in April 1990 for a position on the Eleventh Circuit Court of Appeals, and his nomination was returned to the White House when the 101st Congress adjourned. Despite the concerns of civil rights groups that Ryskamp should not sit on the Eleventh Circuit (the locus of many civil rights cases arising out of Alabama, Georgia and Florida), President Bush renominated Ryskamp in January 1991, in the first days of the new Congress.

Ryskamp's nomination is controversial both because of his record as a district court judge, and because of his membership in a country club in Coral Gables, Florida that allegedly discriminated against blacks and Jews.[58]

As for his judicial record, Ryskamp has ruled against the plaintiff in all but four of the 53 civil rights cases in which he reached a decision as a district court judge.[59] In addition, even though the judge has only been a district court judge since 1986, he has already been reversed by the Eleventh Circuit in nine cases involving civil rights or other constitutional rights and 18 times overall.[60]

Further, Ryskamp has demonstrated considerable judicial insensitivity. In one case where black teenagers sued the City of West Palm Beach after allegedly being mauled by police dogs in separate incidents, Ryskamp made comments on the record that it would not be inappropriate for the teens to carry scars to remind them of their "wrongdoings" in the past.[61] One of the youths had never even been charged with a crime. Ryskamp continued by commenting that in some countries thieves have their hands cut off as punishment for their crimes.[62] The Eleventh Circuit Court of Appeals reversed Ryskamp's decision in that case.[63]

Ryskamp also generated controversy by granting a judgment notwithstanding the verdict ("JNOV") reversing the jury's decision in a racial employment discrimination suit. The Eleventh Circuit reversed Ryskamp again, holding that "once the jury found in [the plaintiff's] favor, the district court was not free to reweigh the evidence."[64]

Other controversial decisions by Ryskamp include one case where he held for the defendant in an age discrimination suit based on arguments and facts never offered by the defense. The Eleventh Circuit again reversed Ryskamp for this judicial activism.[65]

Ryskamp was renominated in early January 1991. At the time of publication, no hearings have yet been scheduled.

3. CLARENCE THOMAS

The former chair of the EEOC, Clarence Thomas was nominated by President Bush in October 1989 for a position on the influential D.C. Circuit Court of Appeals.[66] Thomas, President Bush's first black nominee, encountered immediate opposition because of his record while at the EEOC. Following his nomination, Thomas faced a number of concerns by civil rights organizations and groups representing the elderly about his commitment to equal justice and thus his qualifications for a position on the Court of Appeals.[67] Thomas was accused of jeopardizing thousands of age discrimination cases by delaying prosecution.[68] Because of these accusations, Judiciary Committee members requested volumes of documents from Thomas to investigate the allegations. The Judiciary Committee came under fire from the conservative press for its extensive investigation and request for documents.[69] While the press geared up for a major battle, the Judiciary Committee investigation revealed insufficient evidence to prove the accusations against Thomas. A low-key Judiciary Committee hearing resulted in Thomas' confirmation.

4. VAUGHN R. WALKER

Yet another Bush nominee to generate controversy was Vaughn R. Walker. He was first nominated by Ronald Reagan for a position on the Federal District Court for the Northern District of California in 1988.[70] Initially, the nomination was not acted upon because Walker was a member of the Olympic Club in San Francisco, which discriminates against women, and has been found in the past to discriminate against blacks.[71] Walker refused to resign from the club, and had made no efforts to change the club's membership policies.[72] President Bush indicated that he would resubmit Walker's nomination in February 1989, and, after Walker finally resigned from the club, Bush resubmitted Walker's nomination[73] Convinced that Walker had resigned from the club for "sincere" reasons, and that he had made efforts to change the club from within, the Senate Judiciary Committee recommended that Walker be confirmed by the full Senate.[74]

The controversy over the Walker nomination has stirred greater concern over the issue of membership in discriminatory clubs. Membership in a club which discriminates against minorities is not a matter of privilege or image: it reflects an indifference to fairness and equal justice.[75] The ABA Code of Judicial Conduct officially recognizes that membership in clubs with discriminatory membership policies is inconsistent with the appearance of impartiality essential for judges.[76] A revision to the Code which will require resignation from such clubs was recently adopted by the ABA.

The Senate Judiciary Committee has also examined this issue. The Committee had been dealing with the club membership problem on a case-by-case basis. However, in April 1990, the Committee passed a resolution stating that "it is inappropriate today for individuals who may be nominated in the future to serve in the Federal judiciary [sic] or the Department of Justice to belong to. . . discriminatory clubs, unless such persons are actively engaged in bona fide efforts to eliminate discriminatory practices."[77]

While such a resolution does not bind the President in his selection of nominees, it puts the Administration on notice that candidates who maintain memberships in discriminatory clubs are likely to face difficulties with confirmation.

IV. Recommendations

In our previous report we made several recommendations to the new Administration on ways to increase the diversity of the federal judiciary and its commitment to equal justice: the Reagan Administration's emphasis on ideology overrode any attempt to ensure that judicial nominees had a commitment to equal justice.[78] We reaffirm our support of these recommendations:

1. REJECT IDEOLOGICAL LITMUS TESTS

Ronald Reagan screened candidates according to an ideological litmus test, rejecting those automatically who departed from an ultra-conservative social agenda. While the Bush Administration has abolished the OLP screening process, it achieves the same goals through its own screening techniques. This is partly because President Bush often selects appellate judges from a pool of Reagan-selected district court judges. His pool contains many candidates who have already passed the Reagan litmus test. Even when President Bush chooses candidates from outside that pool, their judicial philosophy is apparent from their writings and history. We urge the Bush Administration to cease making selections based on ideology and to adopt the following ways of ensuring a competent, impartial, and equitable judiciary.

2. REQUIRE A DEMONSTRATED COMMITMENT TO EQUAL JUSTICE UNDER THE LAW

As recommended in our previous report, a demonstrated commitment to equal justice must be required of all members of the judiciary. This commitment to equal justice includes being open-minded, lacking prejudice, and being a regular participant in activities promoting equality and a just society. A candidate who is committed to an ultra-conservative ideology is likely to have the impartiality and openness-of-mind necessary to be committed to equal justice.

Further, knowing that a person chooses to associate with those who discriminate tells a great deal about that person's character. Lifelong habits of associating with those who discriminate cannot be ignored. Expedient resignation from a discriminatory club on the eve of nomination is simply not persuasive. Because of this, it is inappropriate for members of the judiciary to have past or present memberships in organizations that discriminate. The Senate Judiciary Committee must let the Bush Administration know that past membership in discriminatory clubs will not be tolerated in the judiciary. We urge the Bush Administration to affirm that such membership will not be tolerated, and to affirm that commitment to equal justice under law will be required of all judicial nominees.

3. REACTIVATE THE MERIT COMMISSIONS FOR APPELLATE NOMINATIONS

Under President Carter, independent regional commissions composed of lawyers and lay persons compiled a list of candidates to be considered for appellate court judgeships. The commissions selected five names, who, after thorough screening and interviewing, were presented to the President. The selections were made based on reputation and merit, not on political or judicial ideology. This system was dismantled by President Reagan and replaced with the Office of Legal Policy. Our last report recommended that the merit commissions be reinstated. Instead, President Bush has replaced the OLP with a small circle of trusted aides who continue to perpetuate the Reagan selection process. We again recommend that merit commissions be reestablished as a way to guarantee diversity and quality in the judiciary.

4. SEEK GREATER INPUT FROM THE PUBLIC ON NOMINEES

As mentioned in our previous report, it is vital that the public provide its input on judicial nominations. When Clarence Thomas was nominated, certain citizens' groups immediately alerted both the press and the Senate Judiciary Committee of their suspicions regarding Thomas' lackluster commitment to equal justice. This information allowed the Judiciary Committee to thoroughly investigate all allegations. Public information is critical to an effective nominations process.

5. SPECIAL CONSIDERATIONS FOR SUPREME COURT NOMINEES

In addition to reaffirming our commitment to the previous recommendations, we add these special considerations for the Bush Administration to keep in mind when appointing candidates to the Supreme Court.

The Court over the last 35 years has interpreted the Constitution in a way that guarantees many important constitutional rights. These rights have become part of the fabric of our society. Advances have been made to overcome centuries of discrimination.

President Reagan's campaign to change the direction of the federal judiciary was a backdoor attempt to legislate where Congress had refused. Ronald Reagan took advantage of his nomination power to appoint a judiciary that would implement his conservative social agenda against the will of the majority. This approach was also central to his nominations for the Supreme Court.

George Bush's aides appear to be perpetuating the Reagan strategy. They clearly indicate that their goal is to change the direction of the federal judiciary. This strategy violates the spirit of the separation of powers. It permits the judiciary, which is politically unaccountable, to change the law to support an ideological agenda.

The President should not allow this approach to dominate his nominations to the lower courts or the Supreme Court. The Constitution is a sacred document declaring the rights of the people of this country. The rights guaranteed under this document must not change dramatically depending on which political party is in power. The Court must interpret the Constitution without a political agenda, respect its own prior decisions, and refrain from taking away rights guaranteed by the Constitution merely because they conflict with a particular political ideology.

VI. Conclusion

George Bush has filled 70 life-tenured positions on the federal judiciary in his first two years in office. With more than 50 current vacancies in the federal judiciary, and 85 newly-created judgeships, President Bush will have the opportunity to again change the face of this nation's judiciary. Our fate must not be in the hands of a judiciary showing no commitment to equal justice under law. Further, with Justice Brennan's resignation, and two sitting justices over 80 years old, President Bush will have the chance to significantly change the direction of the country's highest court. It is important that, with future Supreme Court appointments, the President seeks to maintain balance on the Court, so that it does not retreat into an area where constitutional freedoms and basic principles of equal justice are reversed.

It is vital that the judiciary represent all people. It is the duty of the Bush Administration to ensure that ideology is not used to replace a commitment to fairness and equality for *all* under the law.

Chapter XXV

Confronting Prejudice: Passage of the Hate Crime Statistics Act

by Susan Armsby

I. Introduction

Pipe-wielding skinheads in Laguna Beach, California yelled "kill the faggot" while beating a gay man unconscious.[1] Anti-Semitic epithets, obscenities and "KKK" were spray-painted on the Temple Rodef Shalom in Falls Church, Virginia.[2] An Ethiopian man was clubbed to death with a baseball bat by white supremacists in Portland, Oregon.[3] A cross was burned on the lawn of a Hmong (Laotian) family in Eureka, California.[4] Rochester, New York police report that a gang of teenagers from affluent families was responsible for dozens of "gay bashing" attacks in a city park over the course of a year.[5] A black New York woman was terrorized by skinheads who demanded that she pay a "nigger tax" to be able to walk on the street.[6] Claiming they hated Vietnamese, two North Carolina men severely beat an Asian American man with the butt of a gun, killing him.[7] "Death to Arabs" defaced an Islamic mosque in Houston, Texas.[8]

These are all examples of hate crimes; crimes motivated by prejudice against the victim's race, religion, ethnicity or sexual orientation. Accounts of hate crimes frequently appear in newspapers across the country. But hate crimes are not isolated incidents; they are evidence of our nation's failure to realize "a more perfect union" where people live together peacefully, respectful of individual differences.

In recent years there has been a growing realization that bias-motivated violence poses a serious threat to the fabric of our society, and that the incidence of hate crimes is apparently on the rise.[9] No longer are hate crimes being dismissed as mere pranks or the victims dismissed as somehow deserving attack.

Because data on hate crimes have not been collected in a systematic, reliable and timely manner, law enforcement and public officials lack adequate information on the national scope of hate crimes. By learning the extent of the problem, and the methods and tendencies of hate crime perpetrators, law enforcement officials will be better able to confront — and eventually reduce — hate-motivated violence.

Until 1990, the federal government had done nothing to ascertain the scope and nature of hate crimes in the United States. The motivation of criminals traditionally has been irrelevant to the police and courts. Indeed, sometimes it is hard to tell why a crime is committed. Other times, evidence of motivation is reflected in the facts of the case. But because most perpetrators of hate crimes attack simply to send a message of hate, the facts of the case can lead police and victims to conclude that prejudice was the motive.

At a ceremony which generated some controversy, President Bush signed the Hate Crime Statistics Act into law on April 23, 1990. The legislation directs the Department of Justice to collect and publish data for five years on crimes which manifest evidence of prejudice based on race, religion, ethnicity or sexual orientation.[10] Passage of the Hate Crime Statistics Act is the first step toward a national solution to this growing problem of hate-motivated violence.

II. History of the Hate Crime Statistics Act

A. EFFORTS OF THE PUBLIC INTEREST COMMUNITY

The public interest community began the movement to document hate crimes. In 1979, the Anti-Defamation League of B'nai B'rith (ADL) pioneered the collection of statistics on hate crimes, specifically collecting information on anti-Semitic activities. Every year since then the ADL has published a report on anti-Semitic violence while urging local officials to investigate and prosecute the offenders.[11] Klanwatch, a project of the Southern Poverty Law Center, began collecting accounts of primarily Klan and Nazi violence in 1980 and the National Gay and Lesbian Task Force (NGLTF) started annual reporting of anti-gay violence in 1986. The Center for Democratic Renewal published in 1987 "They Don't All Wear Sheets," a chronology of racist and Far Right violence during the years 1980-1986. The National Institute Against Prejudice and Violence (NIAPV) was founded in 1984 to study the incidence and response to ethnoviolence. The National Organization of Black Law Enforcement Executives (NOBLE) developed a handbook on standards and protocols for law enforcement response and investigation of hate crimes in the 1983. Collectively, these organizations have reported thousands of hate crimes, committed by hate groups and individuals.

B. STATE EFFORTS

In 1980, Maryland became the first state to collect hate crimes statistics and found that the practice benefits the police by enabling them to create immediate and long-term responses to hate crimes and by assuring the victims that the government cares about what happens to them.[12] The chief of the Baltimore County Police Department, Neil J. Behan, believes that reporting hate crimes is just the first step: "I tell my officers that they are not to leave a neighborhood after a hate crime until that victim and neighborhood are made whole again. A cross burning is not a simple arson, and a swastika painted on a temple is not mere vandalism."[13]

By 1990, only 12 other states had followed Maryland's lead.[14] Although the various reports used different criteria for determining hate crimes and sometimes focused on victimization of specific groups, a national portrait of intolerance began to emerge, and it alarmed policy makers.

C. FEDERAL LEGISLATION

Representative Barbara Kennelly (D-CT) introduced federal legislation in 1984 directing the Department of Justice to collect statistics on crimes motivated by racial, religious or ethnic prejudice through the FBI's Uniform Crime Reporting (UCR) system.[15] This groundbreaking proposal — the Hate Crime Statistics Act — was based on the recommendation of the Connecticut State Advisory Committee to the U.S. Commission on Civil Rights in an October 1982 study, "Hate Groups and Acts of Bigotry: Connecticut's Response."[16] The U.S. Commission on Civil Rights approved the Connecticut recommendation in their 1983 publication, "Intimidation and Violence, Racial and Religious Bigotry in America."[17]

Opposition to the Hate Crime Statistics Act was essentially based on two concerns: data collection would be too difficult and fruitless a task; and acknowledging anti-gay violence would bring to public attention the reality of anti-gay discrimination.

The Reagan administration was adamantly opposed to the legislation.[18] William Baker of the FBI testified in opposition to the Hate Crime Statistics Act in 1985, objecting to the mandated use of the UCR and contending that the data would be incomplete and too subjective.[19]

In February 1987, a "debate was raging" between Assistant Attorney General William Bradford Reynolds and civil rights groups over whether hate crimes were increasing.[20] Reynolds contended that civil rights complaints received by the Department of Justice did not demonstrate an increase in hate crimes, although the groups cited the DOJ Community Relations Service's own reports of increased racial violence.[21]

Assistant Attorney General John Bolton expressed the Reagan administration's continuing opposition in December 1987:

> [W]e cannot in good conscience endorse the bill. To do so would be to accept an impossible task and, in the process, to condemn state and local law enforcement agencies ... to an oppressive burden.[22]

Nonetheless, over a six year period, congressional supporters continued to seek passage of the legislation. The wording of the Hate Crime Statistics Act evolved over this period. The mandate to collect the statistics through the UCR system was dropped in deference to DOJ's request in the 99th Congress. The crimes listed for statistics collection (murder; non-negligent manslaughter; forcible rape; aggravated assault, simple assault, intimidation; arson; and destruction, damage or vandalism of property) by the 101st Congress were only those listed on the UCR reporting form. The Senate Judiciary Committee report stated:

> While S. 419 (the Hate Crime Statistics Act) does not require the Attorney General to use the UCR to collect the data on hate crimes, the committee believes that the updated UCR would enable the Justice Department to easily implement S. 419. Whether or not the UCR is the vehicle to record hate crimes, the categories of crimes listed in the act correspond with those in the new UCR and should expedite implementation of the bill, as the FBI has already developed uniform offense definitions for these categories.[23]

"Sexual orientation" was added to "race, religion and ethnicity" as covered characteristics after hearings on anti-gay violence on October 9, 1986, clearly demonstrated that the bigotry against gays and lesbians was qualitatively the same as bigotry against Jews, Blacks, Hispanics, Asians, and others.[24] A consensus was developed that to exclude "sexual orientation" from the Hate Crime Statistics Act would send the incorrect message that anti-gay violence either does not exist or is acceptable. Moreover, a 1987 study on hate crimes commissioned by the National Institute of Justice, the research arm of the Department of Justice, conducted by Abt Associates Inc. concluded that:

> The most frequent victims of hate violence today are blacks, Hispanics, Southeast Asians, Jews, and gays and lesbians. Homosexuals are probably the most frequent victims.[25]

Legislative language was also added that clarified that the act does not create any new rights, including a right to bring an action based on discrimination due to sexual orientation. Even with this explicit language, "sexual orientation" became the bill's only controversial element. The Hate Crime Statistics Act would be the first federal legislation to treat "sexual orientation" in a way that did not cast a negative social judgment on gays and lesbians.

The House of Representatives overwhelmingly passed the Hate Crime Statistics Act in the 99th, 100th and 101st Congresses. Representative John Conyers (D-MI) became the legislation's chief proponent in the 100th Congress, when "sexual orientation" was added. Representative Charles Schumer (D-NY) emerged as a leading House advocate in the 101st Congress. In both Congresses, Representative William

Dannemeyer (R-CA) railed against the inclusion of "sexual orientation":

> This legislation conveys the entirely reasonable message that some hate crimes are worse then others. Indeed, for the crimes manifesting prejudice on the basis [of] race, color, religion, and national origin, such an inference makes sense. But there are sound historical and philosophical reasons for restricting the number of suspect classes to those mentioned above. Homosexuality, which this legislation equates with race and religion, does not fit into that honorable tradition.[26]

His amendments to delete "sexual orientation" from the bill were soundly rejected.[27]

The only Senate hearings on the Hate Crime Statistics Act were held by the Subcommittee on the Constitution in the 100th Congress. Witnesses repeatedly urged Chairman Paul Simon (D-IL) to adopt an amendment to the Hate Crime Statistics Act to include "sexual orientation."[28] The Subcommittee also considered the important issue of developing criteria to define hate crimes. Although the Reagan administration remained opposed to the bill, the U.S. Commission on Civil Rights continued its support for the legislation. Vice Chair Murray Friedman presented the Commission's resolution endorsing the Hate Crime Statistics Act and further stated "that the Commission wishes to emphasize that such legislation, if enacted, should mandate clear, workable criteria for police departments to follow in their determination of what constitutes a bigotry-related crime, or such criteria should be specified in implementing regulations."[29]

The American Psychological Association submitted testimony to the Subcommittee suggesting common sense criteria for determining whether a hate crime had been committed. The APA standards suggest that crimes meeting any combination of the following criteria are likely hate crimes:

1.Visible displays associated with the commission of an offense (cross burnings, swastikas scrawled on a synagogue, or hate mail);

2.Physical consequences resulting from the commission of an offense (vandalized or desecrated cemetery or other property);

3.Victim or witness statements describing the perpetrator wearing symbolic clothing (wearing of a hood or other clothing indicating membership in a group prone to hate violence);

4.Victim or witness testimony about the statements and actions of the perpetrator during the commission of the crime (uttering racial or ethnic slurs, assault without robbery, or telephone threats);

5.Evidence of mutilation (a large number of stab wounds or a severe beating);

6.Previous history of similar incidents in the same area and/or committed in a similar pattern to prior verified hate crime incidents (series of assaults against gay persons or incidents of racial conflict; or similarity to events reported in the recent news coverage of hate crimes);

7.Victim is assaulted during a civil rights march or other legal activity on behalf of a racial, ethnic, religious or sexual orientation cause.[30]

The 100th Congress adjourned without Senate action on the Hate Crime Statistics Act (which was amended to include "sexual orientation"), primarily because Senator Jesse Helms (R-NC), well-known for his inflammatory rhetoric against gays, had indicated that he would launch a filibuster if it was brought up for debate.[31]

By the 101st Congress, nearly 100 organizations had joined the coalition pushing for passage of the Hate Crime Statistics Act, including religious, civil rights, law enforcement and professional groups. The support from the law enforcement community was particularly important as it showed that the police had come to want the data collection responsibility because they believed that the effort would be useful and important in carrying out their duties.[32] Under the leadership of Maine Attorney General James Tierney, the National Association of Attorneys General unanimously voted in favor of a resolution supporting the Hate Crime Statistics Act in 1989.[33]

President Bush and Attorney General Richard Thornburgh became champions in this battle against bigotry. Both publicly called for passage of the Hate Crime Statistics Act[34] and the President, during his 1990 State of the Union address, said:

> We must maintain the democratic decency that makes a nation out of millions of individuals. And I've been appalled at the recent mail-bombings across this country. Every one of us must confront and condemn racism, anti-Semitism, bigotry and hate. Not next week, not tomorrow, but right now. Every single one of us.[35]

After an intensive lobbying campaign to counter Senator Helms's opposition to the legislation and to clear the way for consideration of the bill by the full Senate,[36] the Hate Crime Statistics Act was finally debated on February 8, 1990.

Senator Orrin Hatch (R-UT) was crucial in attracting Republican support for the legislation and in crafting a strategy, with Senator Simon and Republican Minority Leader Robert Dole, to draw support away from an anti-gay amendment Senator Helms intended to offer.[37] By voting for the substitute Hatch-Simon-Dole amendment, which stated that nothing in the act shall be construed to promote or encourage homosexuality and that honored the American family, Senators felt they were provided with enough political "cover" to then vote against Helms's homophobic amendment.[38] The vote on final passage of the Hate Crime Statistics Act was 92-4.

Among the invited guests at the White House ceremony marking the signing of the bill were representatives of the gay and lesbian community who had worked diligently for the legislation's passage. They proudly publicized their presence at the ceremony as the first time the community had been invited to a public event at the White House. Some of the

President's right-wing supporters, however, roundly criticized the President and his advisors for not excluding the gay community's representatives.[39] Many of them also complained when First Lady Barbara Bush wrote to the president of the Federation of Parents and Friends of Lesbians and Gays shortly after the signing ceremony.[40] Mrs. Bush wrote:

> I firmly believe that we cannot tolerate discrimination against any individuals or groups in our country. Such treatment always brings with it pain and perpetuates hate and intolerance. I appreciate so much your sharing the information about your organization and your encouraging me to help change attitudes.[41]

The White House later fired the special assistant to the President in the Office of Public Liaison who reportedly criticized the gay community's invitation and encouraged the reaction from the right wing.[42]

III. Implementation

On July 3, 1990, Attorney General Thornburgh assigned the UCR the task of collecting the hate crimes statistics.[43] Under the leadership of Harper Wilson, the UCR staff had anticipated the passage of the Hate Crime Statistics Act and had already started planning its implementation. With the target date of January 1, 1991 set to begin the statistics collection, the staff of the UCR worked closely with state UCR directors, hate crime statistics experts and the legislation's advocates, including ADL, NOBLE, NGLTF, NIAPV, NAACP, the International Association of Chiefs of Police, the Police Executive Research Forum, the Criminal Justice Statistics Association, and People For the American Way, to develop guidelines and training manuals.[44]

The UCR staff solicited and accepted numerous refinements to its proposed statistics collection system, and in the process, developed an understanding with the interested parties that the first several years would be difficult and would probably yield uneven results. The UCR system itself is undergoing revision: from the Summary Reporting System, which will capture only a few hate crimes data elements, to the National Incident-Based Reporting System, which will capture more hate crimes data elements. Furthermore, the hate crimes reports will only be as good as the training received by law enforcement officers. It is expected to take several years for the proper training to be provided to the 16,000 law enforcement agencies that report to the UCR. Under-reporting of anti-gay violence is also to be expected because of the dilemma victims face: self-identification as a gay or lesbian can lead to losing one's job, housing, privacy or family acceptance.

However challenging the mandate to identify and respond to hate crimes, the UCR guidelines establish the importance of the effort:

> [T]here are those who are victimized, sometimes subtly and other times very overtly, for no reason other than the color of their skin, the religion they profess, the heritage of their parents, or their sexual orientation. It is most unsettling to the victims because there is nothing they can do to alter the situation, nor is there anything that they should be expected to change. Not only is the individual who is personally touched by these offenses victimized, but the entire class of individuals residing in the community is affected.
>
> For these reasons, law enforcement officers must be particularly skillful in responding in such a way that the trauma of the victim and the community is not exacerbated by a lack of sensitivity in the law enforcement response.
>
> ...As hate crime offenders are brought to justice and the victims regain their sense of personal safety and respect, justice will be served because it can then be truly said that the rights of individuals under the Constitution will be theirs 'not by virtue of birth or characteristics or merit or excellence, but simply as human beings.'[45]

The passage and implementation of the Hate Crime Statistics Act marks important progress in combatting crimes motivated by bigotry.

Endnotes

The Report, Chapters I, II, and III

1. *Whites Retain Negative View of Minorities, A Survey Finds*, N.Y. Times, Jan. 10, 1991.

2. *Bush Honors King, Pledges War on Racism*, Wash. Times, Jan. 17, 1989.

3. For example, President Bush appointed Dr. Louis Sullivan to serve as Secretary of Health and Human Services, Constance Newman to serve as Director of the Office of Personnel Management, and Arthur Fletcher to Chair the U.S. Commission on Civil Rights.

4. Citizens Commission on Civil Rights, *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* (1989) at 6-13; *see also* National Resource Council, *A Common Destiny: Blacks and American Society* (1989) [hereinafter cited as "*A Common Destiny*"]. For additional discussion of the continuing effects of our national legacy of discrimination, see section II of this report, infra.

5. Center for the Study of Social Policy, "Kids Count," at 2-3.

6. *Id.*

7. *Id.* at 11.

8. American Academy of Pediatrics, "Statement on the Needs of American Children and Youth," Hearing Before the Senate Labor and Human Resources Committee, January 15, 1991, at 2.

9. *Id.*

10. *Id.* at 10-11.

11. National Center for Children in Poverty, "Five Million Children: A Statistical Profile of Our Poorest Young Citizens," at 29.

12. Sen. Edward Kennedy, Statement before Senate Labor and Human Resources Committee, January 15, 1991.

13. W. T. Grant Foundation Commission on Work, Family and Citizenship, "American Youth: A Statistical Snapshot" (1989) at 21.

14. Statement of the National Education Association on the Needs of American Families, before the Senate Committee on Labor and Human Resources, January 11, 1991, at 3.

15. Census Bureau, U. S. Department of Commerce, Current Population Reports, Consumer Income, Series P-60, no. 166.

16. The Hudson Institute, *Workforce 2000: Work and Workers for the 21st Century*, 1987, at 89.

17. Office of Fair Housing and Equal Opportunity, U. S. Department of Housing and Urban Development, "Civil Rights Data on HUD Program Applicants and Beneficiaries," 1989 Annual Report, at 2-3.

18. *Congressional Quarterly Editorial Research Report*, "The Homeless: Who Are They?" May 30, 1990, at 178.

19. David Ruffin, "Unrestrained Spending for Prisons," *Focus*, January, 1990, at 7.

20. Katherine McFate, "Black Males and the Drug Trade: New Entrepreneurs or New Illusions?" *Focus*, May, 1990, at 5.

21. David Ruffin, "The Color of Capital Punishment," *Focus*, October, 1990, at 7.

22. *The State of Black America*, National Urban League, at 293-4.

23. *Id.* at 252.

24. *Bush Vows New Efforts for Equal Opportunity*, N. Y. Times, Aug. 9, 1989.

25. *Bush Pledges Vigilant Civil Rights Enforcement*, Wash. Post, Jul. 1, 1989.

26. For further discussion of Sullivan's policy initiatives, see Chapter XI, *infra*.

27. For further discussion of the efforts to revitalize the U.S. Civil Rights Commission, see Chapter XXIII, *infra*.

28. *Breaking the Corporate 'Glass Ceiling'*, Wash. Post, Jan. 14, 1991.

29. *Bush Quietly Fosters Conservative Trend in Courts*, Wash. Post, Feb. 18, 1991, at 1.

30. *See* Alliance for Justice, Judicial Selection Project, Year End Report, Dec., 1990, People for the American Way Action Fund, 2 Nominations Network News, Dec. 1990, at 10.

31. For further discussion of the Bush judicial selection process, see chapter XXIV, *infra*.

32. In the course of a protracted nomination battle, additional and disturbing details of Lucas's record came to light. They included: a pattern of misrepresentation by Lucas of his job and personal history on resumes and bar applications; a citation for contempt of court against Sheriff Lucas for "intentional" defiance of court orders and gross mismanagement of the jails; a staggering debt run up by Lucas as Wayne County Executive; and a stiff fine levied on Lucas by the Customs Service for "deliberately" attempting to avoid pay-

ing duty on thousands of dollars of goods bought overseas. Diegmueller, "Nomination for Rights Post Clouds Overture to Minorities," *Insight Magazine*, May 8, 1989, at 18.

33. *See, e.g.*, Remarks of John R. Dunne to NAACP LDF Conference, "Civil Rights Enforcement in the Bush Administration," October 6, 1990.

34. Near the end of congressional consideration of the Civil Rights Act of 1990, the Administration did support a damages remedy proposed by Senator Nancy Kassebaum which would have capped damages for victims of sex discrimination at a level significantly lower than damages available to other victims of race discrimination.

35. *One Nation, Indivisible, supra* note 4 at 44.

36. *One Nation, Indivisible, supra* note 4, at chapter XXI (includes a full discussion of the Reagan record on voting rights).

37. A number of parties, led by the city of New York have challenged the accuracy of the 1990 census, claiming that minorities have been severely undercounted. The issues surrounding the census undercount are discussed in greater detail in Chapter XVIII of the report.

38. Dunne, "American Civil Rights in the 1990's," New York Bar Journal, Oct. 1990 at 9.

39. Petition for a writ of certiorari, p. 8, *United States v. Roemer, cert. granted*, 59 U.S.L.W. 3501 (Jan. 18, 1991)(No. 90-1032).

40. *Collins v. City of Norfolk* (No. 89-989) and *Liberty County, Florida v. Solomon* (No. 90-102).

41. *Thornburg v. Gingles*, 478 U.S. 30 (1986).

42. Section 5 Objection Letter from Assistant Attorney General John R. Dunne to Georgia Attorney General Michael Bowers, April 25, 1990; Section 5 Objection Letter from Dunne to Louisiana Assistant Attorney General Cynthia Y. Rougeou, Sept. 17, 1990; Section 5 Objection Letter from Dunne to Texas Special Assistant for Elections Tom Harrison, Nov. 5, 1990.

43. Citizens Commission on Civil Rights, *Barriers to Registration and Voting* (1988) at chapter V [hereinafter cited as "*Barriers to Registration*"].

44. *Barriers to Registration, supra* note 43 at chapter III.

45. *See* Carol T. Crawford, Asst. Attorney General, U.S. Department of Justice: Letter to the Honorable Wendell H. Ford, Chairman, Committee on Rules and Administration; Jun. 7, 1989, *printed in* "National Voter Registration Act of 1989," Report of the Committee on Rules and Administration, S. 874, 101st Cong., 1st Sess., at 43 (1989).

46. Dominquez' background includes prior experience at OFCCP and as a private section EEO officer.

47. *Board of Governors of the University of North Carolina v. Department of Labor*, No. 89-3359 (4th Cir. 1990); *Stouffer Foods Corp. v. Dole*, No. 7:89-2149-3 (E.D. S.C. Nov. 1990); *US Air v. Dole*, No. 90-2505 (4th Cir. 1990).

48. *A Common Destiny, supra* note 4, Chapter 7.

49. *See One Nation, Indivisible, supra* note 4, Chapter IX.

50. Carter and Wilson, "Ninth Annual Status Report on Minorities in Higher Education," at iv (January 1991).

51. *Id.*

52. *See Hearing before the Senate Committee on Labor and Human Resources*, 101st Cong., 2nd Sess. (Nov. 1990) (Statement of Michael Williams).

53. *Id.*

54. *Review of Race-Based Scholarships Promised*, Wash. Post, Feb. 7, 1991.

55. *Geier v. Alexander*, 593 F. Supp. 1263 (M.D. Tenn 1984).

56. *Freeman v. Cavazos*, 1990 Westlaw 141483 (D.D.C. No. 90-2175, Sept. 20, 1990) at 2.

57. *At Justice, a Shift on School Desegregation*, Wash. Post, Jan. 24, 1991.

58. *See, e.g., Green v. County School Board*, 391 U.S. 430, 449; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 32 (1971).

59. *Green*, 391 U.S. at 435.

60. Arrington, "Supreme Court Hears Oral Argument in School Desegregation Case," Civil Rights Monitor, Fall 1990, at 11.

61. *Id.*

62. *See* Letter to Hon. Major Owens from Bruce C. Navarro, Acting Assistant Attorney General for Legislation (April 6, 1990) in which Mr. Navarro outlines the administration's objections to several provisions in the pending Education of the Handicapped Act which would give preferences to minority institutions in the award of certain contracts and grants under the Act.

63. *See* Statement by the President, accompanying the signing of the "Carl D. Perkins Vocational and Applied Technology Education Act Amendments of 1990," September 25, 1990.

Chapter IV

1. *See, e.g., Slack v. Havens*, 522 F.2d 1091 (9th Cir. 1975).

2. *See, e.g., Lorance v. A.T.&T. Technologies*, 109 S. Ct. 2261 (1989).

3. *See* B. L. Schlei & P. Grossman, Employment Discrimination Law 5 (A.B.A. 2d ed. 1983) [hereinafter cited as

Schlei & Grossman]. As William T. Coleman, Jr. noted in his statement before the Senate, "*Griggs* in the field of employment is comparable to *Brown* in the field of education." *Joint Hearings Before the Comm. on Educ. and Labor and the Subcomm. on Civil and Constitutional Rights of the Comm. on the Judiciary,* House of Reps., 101st Cong., 2nd Sess., Vol. 1, Feb. 20 and 27, 1990, at 442-43. [hereinafter cited as *Joint Hearings*]. Congress endorsed *Griggs* in 1972 when it adopted the Equal Employment Opportunity Act to strengthen Title VII. *See* S. Rep. No. 415, 92nd Cong., 1st Sess. 5, 14-15 (1971); H.R. Rep. No. 238, 92nd Cong., 1st Sess. 20-22, 37 (1970).

4. *See* 401 U.S. at 431.

5. *Id.* at 432.

6. *Id.* at 431.

7. *See Hazelwood School Dist. v. U. S.*, 433 U.S. 299 (1977).

8. If an employer successfully proves business necessity, an employee may still prevail if she can demonstrate the availability of an equally attractive alternative with a less disparate impact on women or minorities. *See Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

9. *See, e.g., Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *Watkins v. Scott Paper Co.*, 530 F.2d 1159, 1177 (5th Cir.), *cert. denied*, 429 U.S. 861 (1976). Supreme Court decisions have also consistently discussed the requirements of business necessity in terms of the employer's burden. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405, 425 (1975); *Dothard v. Rawlinson*, 433 U.S. 321, 329 (1977); *Connecticut v. Teal*, 457 U.S. 440, 446 (1982).

10. *Griggs*, 401 U.S. at 426.

11. *Id.* at 432.

12. *Id.* at 431.

13. *Dothard v. Rawlinson*, 433 U.S. 321, 331 (1977).

14. *Albemarle Paper Co. v. Moody,* 422 U.S. 405, 431 (1975).

15. *See, e.g., Contreras v. City of Los Angeles*, 656 F.2d 1267 (9th Cir. 1981), *cert. denied*, 455 U.S. 1021 (1982); *Craig v. County of Los Angeles*, 626 F.2d 659, 662 (9th Cir. 1980) (requiring practices to be "significantly job-related"); *deLaurier v. San Diego Unified School Dist.*, 588 F.2d 674, 678-79 (9th Cir. 1978) (using the terms "business necessity" and "job-related" interchangeably).

16. *See, e.g., Blake v. City of Los Angeles*, 595 F.2d 1367, 1376 (9th Cir. 1979) ("necessary to safe and efficient job performance"); *Crawford v. W. Elec. Co., Inc.*, 745 F.2d 1373, 1385 (11th Cir. 1984) ("overriding legitimate business purpose . . . necessary to the safe and efficient operation of the business"); *Green v. Missouri Pac. R.R. Co.*, 523 F.2d 1290, 1298 (8th Cir. 1975) ("essential"); *James v. Stockholm Valves and Fitting Co.*, 559 F.2d 310, 344 (5th Cir. 1977) ("essential"); *United States v. Behlehem Steel Corp.*, 446 F.2d 652, 662 (2d Cir. 1971) (requiring a stricter standard than merely significantly serving business needs).

17. *See* Schlei & Grossman, *supra* note 3, at 112-13, 163. Courts have often emphasized that the employer bears a "heavy burden" to show job-relatedness. *See, e.g., Kirkland v. New York State Dept. of Correctional Servs.*, 520 F.2d 420, 426 (2d. Cir. 1975), *cert. denied*, 421 U.S. 823 (1976); *Boston Chapter, NAACP v. Beecher*, 504 F.2d 38, 42 (2d. Cir. 1975), *cert. denied*, 421 U.S. 910 (1975).

18. *See* Blumrosen, *The Legacy of Griggs: Social Progress and Subjective Judgments*, 63 Chicago-Kent L. Rev. 1 (1987).

19. *See* H.R. Rep. No. 644, 101st Cong., 2d Sess. 21-22 (1990) [hereinafter cited as "House Report"] (finding that black firefighters have more than doubled in the decade after *Griggs*, and noting large increases in the number of police jobs held by women and minorities).

20. *See, e.g., Dothard v. Rawlinson*, 433 U.S. 321 (1977).

21. *See, e.g., Albemarle Paper Co. v. Moody,* 422 U.S. 405 (1975).

22. *See* Bass, *The Bias Below the Surface*, Wash. Post, Mar. 20, 1990 (reviewing research documenting racial and gender stereotypes in the workplace).

23. *See* Schlei & Grossman, *supra* note 3, at 15 ("Direct evidence of discriminatory motivation is now relatively unusual.").

24. *See Griggs,* 401 U.S. at 432.

25. For example, some employers continue to rely on the physical strength test which disproportionately excludes women. *See* Havlett, *Police Fitness Test Called Biased*, U.S.A. Today, Dec. 12, 1989.

26. Despite vocal opposition to the Civil Rights Act among some members of the business community, evidence indicates that disparate impact law has not decreased business profits. *See* Taylor, "Affirmative Government and Affirmative Action: What Works and Why," Paper presented to the National Research Council, March 15, 1990, at 14 (on file with the Citizens' Commission). In fact, by causing employers to reevaluate the quality and reliability of their selection criteria, disparate impact law actually contributes to worker productivity. *See* House Report, *supra* note 19, at 22.

27. *See* Withers & Winston, "Equal Employment Opportunity," Report of the Citizens' Commission on Civil Rights, One Nation, Indivisible: The Civil Rights Challenge for the 1990s 193 (1989) [hereinafter cited as *"One Nation, Indivisible"*].

28. In effecting such a tremendous change in disparate impact law, the majority contended that the burden of persuasion to disprove business necessity has always rested

with the employee. However, as Justice Stevens observed in a strongly worded dissent, the Court's previous cases belie that assertion. *See Wards Cove*, 109 S. Ct. at 2132 (Stevens, J., dissenting). Read in this context, the majority's later concession that, "We acknowledge that some of our earlier decisions can be read as suggesting otherwise," *Wards Cove*, 109 S. Ct. at 2126, is clearly an understatement.

29. *Id.* at 2125-26. In arriving at this definition, the Court adopted Justice O'Connor's analysis in *Watson v. Fort Worth Bank & Trust*, 487 U.S. 977 (1988), a decision in which the Court evenly split over the evidentiary rules applicable to disparate impact cases challenging subjective hiring practices.

30. *Allen v. Seidman*, 881 F.2d 375, 377 (7th Cir. 1989).

31. *See Wards Cove*, 109 S. Ct. at 2124-25. The level of precision and impact that employees must establish is unclear.

32. *Griggs*, for example, permitted employees to challenge both the standardized tests and the high school diploma requirement without mentioning any data measuring the amount of disparate impact attributable to each practice.

33. *See* H.R. Rep. No. 238, 92d Cong., 1st Sess. 8 (1970); *see also* Uniform Guidelines on Employee Selection Procedures, 29 C.F.R. §§ 16-17 (referring to Title VII as targeting "any measure, combination of measures," etc., which operate to produce discrimination).

34. *See Ward's Cove*, 109 S. Ct. at 2133 n.20 (Stevens, J., dissenting).

35. *See* Testimomy of William T. Coleman, *Joint Hearings, supra* note 3, at 468-502 (listing decisions placing the burden of proof on employers asserting the business necessity defense, and decisions requiring a high degree of job-relatedness).

36. *Hill v. Seaboard Cast Line Railroad Co.*, 885 F.2d 804, 812 n.12 (11th Cir. 1989).

37. *Allen v. Seidman*, 881 F.2d 375, 377 (7th Cir. 1989).

38. *See, e.g., Allen v. Seidman*, 881 F.2d 375 (7th Cir. 1989); *Evans v. City of Evanston*, 881 F.2d 382 (7th Cir. 1989); *Bernard v. Gulf Oil Corp.*, 890 F.2d 735 (5th Cir. 1989).

39. *Wards Cove* also narrowed *Albemarle's* least restrictive alternative analysis by permitting courts to consider matters such as cost in evaluating employment alternatives with a less restrictive impact on women and minorities. *See Wards Cove*, 109 S. Ct. at 2127. Employees who fail to disprove business necessity will now have a more difficult time succeeding proving the existence of a less restrictive alternative.

40. Title VII, by contrast, only provides for injunctive and declaratory relief, reinstatement, up to two years of backpay, and attorneys fees. Other differences between the two statutes include the applicable statutes of limitations, which tend to be longer for section 1981 claims, and the availability of jury trials for section 1981 claims but not for Title VII claims.

41. Approximately 3.7 million employees work in firms with fewer than fifteen employees. *See* House Report, *supra* note 19, at 18. For these persons, section 1981 provides the only legal protection from racial discrimination in the workplace.

42. *See Runyon v. McCrary*, 427 U.S. 160 (1976). The Court did, however, in an unusual move, invite the parties arguing *Patterson* to submit briefs on the question of whether *Runyon* should be overruled. The invitation sparked outrage among civil rights advocates, who charged that the Court overstepped the bounds of judicial decorum by inviting arguments to overturn an established decision when the parties themselves had not raised the issue. These groups maintained that the invitation alone demonstrated the Court's hostility to civil rights.

43. *See* Statement of Julius LeVonne Chambers, *Joint Hearings, supra* note 3, at 160.

44. *See* Spitz, Gray & Holtzman, *The Supreme Court and Employment Discrimination: A Summary and Analysis of the Impact of the Decisions of the 1988-1989 Term from the Plaintiff's Perspective* 7-8 [hereinafter cited as "Spitz, Gray & Holtzman"]. *Patterson* left section 1981's applicability to discriminatory denials of promotion somewhat unclear. According to the majority, "Only where the promotion rises to the level of an opportunity for a new and distinct relation between the employee and the employer is such a claim actionable under section 1981." *Patterson*, 109 S. Ct. at 2377. However, as Justice Brennan observed, "It is . . . difficult to see how a 'promotion'— which would seem to imply different duties and employment terms — could be achieved without a new contract . . . ." *Patterson*, 109 S. Ct. at 2395 (Brennan, J., dissenting).

45. The Court's suggested solution to this dilemma — to have civil rights plaintiffs join all potential challengers in the original lawsuit under Rule 19 of the Federal Rules of Civil Procedure — raises several insurmountable problems. First, Rule 19 only authorizes joinder of nonparties where proceeding without joinder would prejudice the nonparties' interests. Although before *Wilks*, nonparty employees with a stake in the litigation would be prejudiced by nonjoinder, after *Wilks* these employees can still challenge the relief awarded despite their non-participation. Second, even if plaintiffs can successfully invoke Rule 19 to identify and join all potentially affected persons, a court could still dismiss the suit entirely if it could not obtain jurisdiction over all affected persons. Finally, the joinder of all *known* affected persons under Rule 19 would still not prevent later challenge of a consent decree by any person not joined in the original proceeding.

46. *See* People for the American Way Action Fund, *The Overall Impact of the Supeme Court's 1989 Decisions on Title VII of the 1964 Civil Rights Act* 51 (1990) [hereinafter cited as "PFAW Report"].

47. *See* Spitz, Gray & Holtzman, *supra* note 44, at 10-11.

48. In *Lorance*, a group of demoted female employees alleged that A.T.&T. had intentionally discriminated against them by switching from plant-wide seniority to job-specific seniority at a time when more women were being promoted to upper level positions. The Court dismissed the case because the challengers waited until they were demoted to file suit, instead of suing soon after the policy itself changed.

49. *See, e.g., Davis v. Boeing Helicopter Co.*, No. 88-0281 (E.D. Pa. Oct. 24, 2989) (LEXIS, Genfed library, Dist file) (system of promoting employees based on a seniority listing); *see also* PFAW Report, *supra* note 46, at 12; Spitz, Gray & Holtzman, *supra* note 44, at 22-23.

50. *See, e.g., Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985); *King v. Trans World Airlines*, Inc., 738 F.2d 255 (8th Cir. 1984); *Ostroff v. Employment Exchange, Inc.*, 683 F.2d 302 (9th Cir. 1982).

51. The role discrimination victims play as the primary enforcers of the civil rights laws has been particularly important in the Reagan and Bush Administrations, as the government pursues fewer and fewer lawsuits challenging discrimination against persons other than white males. The EEOC's efforts to achieve equal opportunity through litigation declined dramatically during the Reagan Administration, *see One Nation, Indivisible, supra* note 27, at 202, and the Bush Administration has given no indication that this trend is likely to be reversed.

52. These other decisions include: *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437 (1987) (refusing to award plaintiffs the costs of expert witness fees as part of recoverable costs and attorneys fees); *Evans v. Jeff D.*, 475 U.S. 717 (1986) (upholding potentially coercive settlement agreements waiving plaintiffs' attorneys fees); *Marek v. Chesny*, 473 U.S. 1 (1985) (preventing civil rights plaintiffs who reject an offer more favorable than the relief obtained at trial from recovering fees for services performed after rejecting the offer).

53. *See* R. Terry, "Eliminating the Plaintiff's Attorney in Equal Employment Litigation," 5 *The Labor Lawyer* 63 (1989).

54. *See Robinson v. Alabama State Dept. of Educ.*, No. 86-T-569-N (M.D. Ala. Nov. 27, 1989), at 17, 18, 20-21.

55. The measure passed in the Senate 65-34 on July 18, 1990, and in the House 272-154 on August 3, 1990.

56. The final vote in the Senate was 66-34.

57. The Act lists the types of demonstrable evidence which a court may receive and weigh appropriately, including statistical reports, validation studies, expert testimony, performance evaluations, written records or notes related to the practice or decision, testimony of individuals with knowledge of the practice or decision involved, other evidence relevant to the employment decision, prior successful experience and other evidence permitted by the Federal Rules of Evidence.

58. The Act also clarifies disparate impact's less restrictive alternative analysis by providing that an employee may still prevail once the employer has proven business necessity by demonstrating that a different practice or group of practices with less disparate impact would "serve the respondent as well." This formulation would make cost one factor, but not necessarily dispositive, in determining whether the alternative is "comparable," and would supplant Justice White's suggestion that even a marginal increase in cost may render a much less discriminatory alternative unacceptable. *See Wards Cove*, 109 S. Ct. at 2127.

59. Otherwise lawful court-ordered remedies, affirmative action plans and conciliation agreements are not affected by this provision.

60. The bill states that "the right to 'make and enforce' contracts" under section 1981 includes "the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship."

61. *See* Newkirk, Vargyas & Greenberger, *Title VII's Failed Promise: The Impact of the Lack of a Damages Remedy* (February 1990) (Report by the National Women's Law Center) [hereinafter cited as "NWLC Report"]. For example, Carol Zabkowicz received no compensation under Title VII for medical expenses resulting from a campaign of severe sexual harassment in the workplace. *See id.* at 11.

62. The bill also authorizes compensatory but not punitive damages for intentional discrimination by federal, state and local agencies.

63. This rule, known as the collateral attack doctrine, was followed by a majority of jurisdictions before *Wilks. See* House Report, *supra* note 19, at 31 & n.20.

64. In addition, this provision lengthens the period during which injured parties may file suit with the Equal Employment Opportunity Commission from 180 days to two years.

65. Provisions to restore the availability of attorneys fees to prevailing plaintiffs include: defining recoverable fees to include expert witness fees and other litigation expense; forbidding a court from entering a consent order, stipulation of dismissal, or judgment which waives the plaintiff's attorneys fees unless the parties or their counsel attest that the waiver of fees was not compelled as a condition of the settlement agreement; permitting prevailing plaintiffs to recover the cost of defending their court-won remedies against later challenge by persons not party to the original lawsuit; and permitting recovery of attorneys fees for services performed after rejecting a settlment offer more favorable to the relief granted at trial.

66. *See* Sector, *Won't Seek Rights Ruling Reversal, Thornburgh Says*, L.A. Times, Jun. 28, 1989.

67. *See*, e.g., *Allen v. Seidman*, 881 F.2d 375 (7th Cir. 1989) (Posner, J.).

68. *See* S. Rep. No. 315, 101st Cong., 2d Sess. 17 & n.7 (1990) [hereinafter cited as "Senate Report"].

69. *See* Davidson, *Civil Rights Groups Turn to Congress to Overcome Recent High Court Rulings*, Wall St. J., Jul. 14, 1989.

70. Specifically, the Administration bill: 1) limited its *Lorance* remedy to cases dealing with seniority systems, despite evidence of its impact in other areas; 2) failed to provide any remedy for the hundreds of bias victims whose cases had previously been dismissed due to *Patterson*; and 3) even with respect to future cases, used langage which could permit the harmful effects of *Patterson* to be preserved in some cases dealing with the terms and conditions of contracts. *See* "Gap Closing Between Versions of Omnibus Civil Rights Bill," Daily Labor Report, November 5, 1990; Leadership Conference on Civil Rights, *Detailed Analysis of Major Problems in the October 20 White House Alternative "Civil Rights" Bill* (1990).

71. *See* Statement of Donald B. Ayer, Deputy Attorney General, *Joint Hearings, supra* note 3, at 366.

72. *See* Holmes, *On Job Rights Bill, A Vow to Try Again in January*, N.Y. Times, Oct. 26, 1990.

73. *See* Cong. Q., July 21, 1990, at 2315; Deibel, *House Backers of Civil Rights Act Fear Impass With White House*, Wash. Times, Jul. 24, 1990.

74. The substitute adopted the Civil Rights Act's definition of business necessity only in those instances where an employee could prove that the practice was "primarily intended to measure job performance." Where an employee could not meet this burden, the substitute adopted the *Wards Cove* definition (reasonably related to a legitimate employment objective). The substitute also left the burden of disproving business necessity on the employee, and prevented employees from challenging groups of employment practices. *See* Leadership Conference on Civil Rights, *The Proposed Opposition Substitute for the Civil Rights Act of 1990: A Major Step Backwards for Civil Rights* (1990).

75. This standard could have justified a different result in *Griggs* itself, for example, as the high school diploma and intelligence tests struck down in that case did not by themselves "cause" the disparity in isolation from the unequal education received by the black workers evaluated under these criteria. The Civil Rights Act instead requires plaintiffs to show that the practice challenged "results in" disparate impact. This formulation better comports with the language "operates to" adopted in *Griggs*.

76. *See* Leadership Conference on Civil Rights, *The Administration-LaFalce Substitute: A Harmful Step Backwards For Civil Rights* (1990).

77. Sununu's letter to Senator Kennedy contained a laundry list of changes necessary for the White House to support the bill, which included issues not previously raised by White House negotiators. *See* Rosenthal, *House Passes Civil Rights Bill to Address Job Bias; White House Vows Veto*, N.Y. Times, Oct. 18, 1990.

78. *See id.*

79. *See Memorandum to the President From Dick Thornburgh*, October 22, 1990. The Attorney General's demands included: that plaintiffs specify the challenged practices even where impossible; that business necessity be defined as in *Wards Cove;* and that the term "motivating" factor — a term suggested by Orrin Hatch — in the *Price Waterhouse* provision be changed back to "contributing" because of its propsensity to penalize bad thoughts.

80. The Senate passed the Civil Rights Act 62-34 on October 16, and the House passed it 273-154 on October 17. *See Vote in House on Legislation to Combat Job Discrimination*, N.Y. Times, Oct. 18, 1990; *Senate Roll-Call on the Civil Rights Bill*, N.Y. Times, Oct. 18, 1990.

81. *See* President's message to Congress vetoing the Civil Rights Act of 1990, Oct. 22, 1990. H.H.S. Secretary Louis Sullivan, O.P.M. Director Constance Newman, Republican William Coleman, and U.S. Civil Rights Commision Chair Arthur Fletcher repeatedly urged the President not to veto the Act. Perhaps the most visible Republican to applaud the President's veto was Louisiana state representative David Duke, who viewed the unsuccessful override vote from the Senate gallery. *See, e.g.*, Hallow, *Duke Claims Partial Credit for Veto of Civil Rights Bill*, Wash. Times, Oct. 25, 1990.

82. *See Senate Vote Upholding Veto of Bias Bill*, N.Y. Times, Oct. 26, 1990.

83. The televised political adverstisement used successfully by Senator Jesse Helms to defeat challenger Harvey Gantt in the recent Senate campaign in North Carolina illustrates this use of the quota issue. The ad addressed working class white voters who feared losing jobs to unqualified minorities solely on the basis of race. Despite its political appeal, the ad had no basis in reality, as such a situation would be plainly unlawful under Title VII. *See, e.g., Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267 (1986) (requiring discrimination to have been committed by the employer, and not by society at large, in order to justify court-ordered or governmental affirmative action); *United Steelworkers of America v. Weber*, 443 U.S. 193 (1979) (holding that voluntary affirmative action plans must respond to a manifest imbalance in traditionally segregated job categories and may not unnecessarily trammel the rights of the majority).

84. *See* Report of the Citizens' Commision on Civil Rights, *Affirmative Action to Open the Door of Job Opportunity*, June 1984, at 84.

85. *See Watson v. Fort Worth Bank and Trust*, 487 U.S. 977 (1988).

86. *See* Pear, *Affirmative Action Proposal Splits Reagan Aids*, N.Y. Times Oct. 22, 1985, at A1.

87. *See, e.g.*, Davidson, *Keep Federal Affirmative Action Strong*, N.Y. Times, Nov. 25, 1985, at A19.

88. *See* Statement of the Lawyers' Committee for Civil Rights Under Law on Threats to the Program Under Executive Order 1126 on Ensuring Nondiscrimination by Government Contractors, Sept. 18, 1985, at 12-17; Leonard, *The Impact of Affirmative Action*, July, 1983, at 384-88 (Report submitted to Dept. of Labor); Leadership Conference Education Fund, Civil Rights Monitor, December, 1985, at 2.

89. *See* W. Coleman, Wash. Post February 23, 1990, at p. A23.

90. *See* Rose, "Tests and Discrimination," *One Nation, Indivisible, supra* note 27, at 170.

91. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 806 (1973).

92. *See* Taylor, *supra* note 26, at 14.

93. *See* Edelman, "How President Plays Civil-Rights Cards," Legal Times, May 20, 1990, at 22.

94. *See, e.g., McCosh v. City of Grand Forks*, 628 F.2d 1058, 1063 (8th Cir. 1980); *deLaurier v. San Diego Unified School Dist.*, 588 F.2d 674, 678 (9th Cir. 1978).

95. *See Connecticut v. Teal*, 457 U.S. 401 (1982) (holding that an employer's bottom line statistical parity is not a defense to an employee's challenge of a practice proven to have a disparate impact).

96. Such groups include the American Jewish Congress, the American Jewish Committee, and the Anti-Defamation League. *See* Homburger, "Once and For All, It's Not a Quota Bill," Legal Times, Jul. 30, 1990; Comay, "The Civil Rights Act is Not a Quota Bill," Christian Science Monitor, Jul. 11, 1990.

97. Republican supporters include, for example, Senators Specter, Danforth, and Domenici, and Representatives Campell, James, and DeWine. Arthur Fletcher, the Republican Chair of the U.S. Civil Rights Commission, has also stated that the bill will not lead to quotas, *see* "Hiring - Quota Issue Snags Civil Rights Bill," USA Today, Jun. 25, 1990, as has William Coleman, former Secretary of Transportation in the Ford Administration.

98. Journalists who have supported the bill include *Business Week's* editorial board and conservative columnists such as James Kilpatrick and Hugh Sidney. *See* "Please Sign This Bill, Mr. Bush," *Business Week*, Sept. 3, 1990.

99. *See Wards Cove*, 109 S. Ct. at 2120-24.

100. The Administration proposal would permit courts to accept anything more than "unsubstantiated opinion and hearsay" as "demonstrable evidence" of business necessity, including anecdotes of "prior successful experience." Under this standard, defending employers probably would have succeeded in defending their business practices in *Griggs* (testimony offered about company's success)and *Albemarle* (inadequate validation study offered).

101. *See, e.g., Green v. U.S.X. Corp.*, 843 F.2d 1511, 1520-25 (3rd Cir. 1988); *Griffin v. Carlin*, 755 F.2d 1516, 1523 (11th Cir. 1985).

102. *See* 29 C.F.R. 1607.16(Q) (applying disparate impact analysis to any "measure, combination of measures, or procedure used as a basis for any employment decisions.") (issued by D.O.J., E.E.O.C., O.P.M. and D.O.L.).

103. Even the Justice Department under Reagan agreed that employees may challenge a group of employment practices where several job factors combine to produce a single ultimate selection decision and it is not possible to challenge each factor. *See* Brief for the U.S., No. 87-1387, p.22 (quoted in *Wards Cove*, 109 S. Ct. at 2132 n.19 (Stevens, J., dissenting)).

104. *See* S. Rep. No. 415, 92nd Cong., 1st Sess. 5 (1971). The Administration bill also required employees to prove that the challenged practice "causes" disparate impact — a requirement which could be interpreted to increase the burden of proof in *Griggs*, as discussed above. The proposal also narrowed disparate impact law's least restrictive alternative analysis by limiting the consideration of less restrictive alternatives to those "comparable in cost." This provision could have been even more burdensome to employees than *Wards Cove*, which recognized cost as only one consideration to be taken into account. The Administration proposal would have made relatively minor differences in cost an absolute defense, instead of merely one factor to consider.

105. *See, e.g., Steelworkers v. Weber.*

106. *See* House Report, *supra* note 19, at 18.

107. Former EEOC Chairs Clarence Thomas and Eleanor Holmes Norton testifed as to the need for compensatory and punitive damages to be available under Title VII. *See* Senate Report, *supra* note 68, at 32.

108. *See Teamsters Local No. 391 v. Terry*, 110 S. Ct. 1339, 1344 (1990) (Seventh Amendment right to jury trial attaches to actions at law, but not actions in equity).

109. Courts have generally regarded compensatory and punitive damages as quintessentially legal relief. *See* Curtis v. Loether, 415 U.S. 189, 196-97 (1974).

110. *See Ross v. Bernhard*, 396 U.S. 531, 537-38 (1970).

111. Although the Administration labels its provision "additional equitable relief," in fact the authorized relief lacks those properties which would justify its classification as "equitable." There is no inadequate remedy at law, *see Dairy Queen, Inc. v. Wood*, 369 U.S. 469, 478 (1962) (cornerstone of equity is inadequate remedy at law), it is not merely "incidental" to equitable relief, *see Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3rd Cir. 1988) (compensatory damages not merely "incidental" to equitable relief), the award is not

restitutionary, *see Mitchell v. Consol. Freightways Corp. of Del.*, 1990 U.S. Dist. (LEXIS 13515 Genfed library, Dist. file) (M.D. Fla. 1990) (compensatory damages not restitutionary in nature), and it is not discretionary in the equitable sense, but rather is dictated largely by proof of harm suffered, *see Beesley v. Hartford Fire Ins. Co.*, 723 F. Supp. 635, 643, 644-45 (N.D. Ala. 1989) (no real discretion under Title VII where purpose is to "make the victim whole"). *See Stetson v. Novack Invest. Co.*, 638 F.2d 1137, 1141 (8th Cir. 1981) (listing three rationales for classifying monetary award of backpay as equitable relief), *amended en banc*, 657 F.2d 962 (on other grounds), *cert. denied*, 454 U.S. 1064 (1981).

112. The Supreme Court has consistently held that the Seventh Amendment guarantees a right to jury trial on claims for monetary damages, *see Terry*, 110 S. Ct. 1339 (1990); *Curtis v. Loether*, 415 U.S. 189 (1974), and early common law courts have regarded damages as peculiarly within the province of the jury. *See Virginia M.R. Co. v. White's Adm'r*, 84 Va. 498, 5 S.E. 573 (1888); *Coffin v. Coffin*, 4 Mass. 1, 41-42 (1808).

113. *See, e.g., Granfinanciera, S.A., et. al. v. Nordberg*, 109 S. Ct. 2782, 2800 (1989) ("Congress cannot eliminate a party's Seventh Amendment right to a jury trial merely by relabelling the cause of action to which it attaches . . . ."); *Cox v. Keystone Carbon Co.*, 861 F.2d 390 (3rd Cir. 1988) (noting that congressional intent not to provide for jury trial does not end the Seventh Amendment analysis). Although an issue removed from the jury by the legislature must be "inherent in and of the essence of the system of trial by jury" in order to violate the right to jury trial, *see Tull v. U.S.*, 107 S. Ct. 1831, 1840 (1987) (quoting *Colgrove v. Battin*, 431 U.S. 149, 156 n.11 (1973)), the assessment of monetary damages probably meets this test. *See supra* n.110.

114. Where Congress would not have enacted a provision without its unconstitutional component, a court must strike the provision in its entirety, and is not free to rewrite the statute in a consitutionally acceptable manner. *See Buckley v. Valeo*, 424 U.S. 1, 108-109 (1976); *City of New Haven v. U.S.*, 809 F.2d 900, 905 (D.C. Cir. 1987).

115. *See, e.g., Brooms v. Regal Tube Co.*, 881 F.2d 412 ((7th Cir. 1989) (black female plaintiff suffered severe injuries resulting from vicious on-the-job harassment).

116. For example, Charlotte Hunter suffered extreme sexual harrassment when she was raped by her supervisor at a "company meeting." *See* NWLC Report, *supra* note 61, at 25-26.

117. *See* White, Shelton, Dickerson & Toth, "Analysis of Damage Awards Under Section 1986," *Joint Hearings, supra* note 3, at vol. 3, at 283-84. Of the 65 claims where the amount of damages awarded could be ascertained, 42 of the combined punative and compensatory damages were $50,000 or less. *See id.*

118. Compromises included changing the former language protecting decisions implementing a court order or consent decree from later collateral attack to apply only to practices "implemented and within the scope of a fully approved litigated or consent order." The change responded to the Administration's concern that a practice might "implement" but still be outside the scope of a decree. Language was also added to require that non-party challengers have actual notice and the opportunity to present objections to be heard before they can be precluded from later challenging an order or consent decree under the provision. Sponsors also added an additional subsection expressly providing that nothing in the section permits the denial of due process, reflecting the drafters' intent that the section not deny persons with greivances a fair opportunity to air their complaints.

119. *See* PFAW Report, *supra* note 46, at 48-49.

120. *See* Statement of Law Professors Concerning the Constitutionality of Procedure Section 6 of the Civil Rights Act of 1990; Brief for the United States at 13-14, *Martin v. Wilks*, 109 S.Ct. 2180 (1989) (Nos. 87-1614-1639, and 87-1668) (noting that a non party can be bound by litigation where there are significant assurances that his interests are adequately represented by a certified class, where he has sufficient control over a party to the litigation, or where there is a special remedial scheme that expressly forecloses successive litigation by nonparticipants).

121. The Administration's "actual notice" requirement includes: notice that the judgment or order is likely to have an adverse effect on the legal rights of the potential challengers; notice of the relief at issue; and notice of a reasonable opportunity to challenge the relief by a specified date, after which persons will likely be barred from challenging the relief.

122. *See* PFAW Report, *supra* note 46, at 47.

123. The alternative bill also declined to extend the filing period for Title VII claims to be more consistent with time limits for filing other discrimination lawsuits. As a result, the Administration bill would have left in place the current anomaly in Title VII which allows employees to recover backpay for up to two years before filing a discrimination claim, but allows employees only 180 days to file the claim, or 300 days if the employee resides in a state or city with its own Fair Employment Practices law. Courts have issued contradictory rulings on the circumstances in which a plaintiff can get backpay for discrimination occurring more than 180 days (in some areas more than 300) before the filing of a charge.

124. The only remaining difference between the Administration and the Civil Rights Act responses to *Price Waterhouse* is that the Administration proposal specifically exempted damages as a remedy where the employer proves that it would have made the same decision even without the discriminatory factor. Damages in such situations would also be unavailable under the Civil Rights Act as passed in

October, although Congress did not expressly include such language.

125. The Reagan Department of Justice conceded that courts may properly award fees and injunctive relief where intentional discrimination was a motivating factor in an adverse employment decision, even if the employer would have arrived at the same decision anyway. *See* Brief of the U.S., *Hopkins v. Price Waterhouse*, No. 87-1167, pp. 7, 23; *see also Bibbs v. Block*, 778 F.2d 1318 (8th Cir. 1985); *Nanty v. The Barrows Co.*, 660 F.2d 1327 (9th Cir. 1981).

126. The Administration bill provided less of a guarantee that a settlement offer may not coerce the waiver of an employee's attorneys fees, and omitted language in the Act to ensure that costs and fees be treated separately. The Administration bill also omitted language granting courts discretion to determine who should pay the attorneys fees in an unsuccessful third party challenge: the employer who discriminated or the unsuccessful challenger of the remedy.

127. *See* House Report, *supra* note 19, at 50-51 (listing previous examples where the Court has adopted overly narrow constructions of civil rights statutes, and recognizing the need to codify a broad rule of construction to interpret civil rights protections).

128. The section was modified to provide that the provisions applied retroactively to the date of the Supreme Court decisions addressed will not affect the final judgments entered before enactment unless a court determines under Federal Rule of Civil Procedure 60(b) that justice requires that the prior judgment be vacated.

129. *See Pension Guaranty Benefit Corp. v. R. A. Gray & Co.*, 467 U.S. 717 (1984); *Counsel v. Dow*, 849 F.2d 731 (2nd Cir. 1988).

130. A Common Destiny: Blacks and American Society 319 (1989).

131. *McDonnell Douglas Corp. v. Green*, 441 U.S. 792, 806 (1973).

Chapter V

1. *See generally* Citizens' Commission on Civil Rights, *One Nation, Indivisible: The Civil Rights Challenge in the 1990s* 88-127 [hereinafter cited as "*One Nation, Indivisible*"].

2. *Brown v. Board of Education*, 347 U.S. 483, 493 (1954).

3. *See, e.g.*, G. Orfield, F. Monfort, *Racial Change and Desegregation in Large School Districts: Trends Through the 1986-87 School Year* (NSBA, June, 1988); J. Chambers, *Adequate Education for All: A Right, An Achievable Goal*, 22 Harv. C.R.-C.L. L. Rev. 55 (Winter 1987); G. Orfield, F. Monfort, R. George, *School Segregation in the 1980s: Trends in the States and Metropolitan Areas* (July, 1987).

4. *See One Nation, Indivisible* at 92.

5. *Id.*

6. *Id.*

7. *Id.* at 98.

8. *Id.* at 93-97.

9. *Id.* at 99-100.

10. *Id.* at 99.

11. *Id.* at 101 & n.113, 114.

12. *Id.* at 102.

13. *Id.* at 104.

14. *Id.* at 104-27.

15. *At Justice, a Shift on School Desegregation*, Wash. Post, Jan. 24, 1991.

16. For further discussion of OCR's enforcement strategy, see part III, *infra*.

17. *Summit's Promise: Social Compact for Reforms*, Education Week, Oct. 4, 1989 at 1.

18. *See* Quality Education for Minorities Project, *Education That Works: An Action Plan for the Education of Minorities* (Jan. 1990) at 23-52.

19. *See infra*, Sections II and III.

20. For discussion of minority scholarship policies, see Chapter VII.

21. *One Nation, Indivisible* at 92-100.

22. Brief for the United States as Amicus Curiae, *Board of Education* v. *Dowell*, No. 89-1080 (U.S. Supreme Court June 1990) [hereinafter cited U.S. *Oklahoma City* Brief"], at 1.

23. 391 U.S. 404, 439, 441 (1968).

24. *See One Nation, Indivisible* at 99-100.

25. Interview, Nathaniel Douglas, Chief, U.S. Department of Justice, Civil Rights Division Enforcement Division (December 1990) ["hereinafter cited as Douglas Interview"].

26. *Dowell v. School Board*, 219 F. Supp. 427 (W.D. Okla. 1963).

27. *Dowell v. Board of Education*, 338 F. Supp. 1256 (W.D. Okla. 1972).

28. *Dowell v. Board of Education*, 606 F. Supp. 1548, 1551 (W.D. Okla. 1985) (quoting motion), *rev'd*, 795 F.2d 1516 (10th Cir. 1986).

29. *Dowell v. Board of Education*, 677 F. Supp. 1503, 1512 (W.D. Okla. 1987).

30. *Dowell v. Board of Education*, 890 F.2d 1483 (10th Cir. 1989).

31. U.S. *Oklahoma City* Brief, *supra* note 22 at 14.

32. *Green v. County School Board*, 391 U.S. at 435.

33. *See, e.g., id.* at 449; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 32 (1971).

34. U.S. *Oklahoma City* Brief, supra note 22 at 18 n.

35. *Id.* at 14.

36. *Id.* at 23-25.

37. *Id.* at 25.

38. *Id.*

39. *Id.*

40. *Id.* at 28-29.

41. *Id.* at 27-28.

42. L. Denniston, *Courtly Manners*, American Lawyer (Dec. 1990) at 80.

43. See *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 21 (1971):

> In the past, choices [regarding residential locations] have been used as a potent weapon for creating or maintaining a state-segregated school system. In addition to the classic pattern of building schools specifically intended for Negro or white students, school authorities have sometimes, since *Brown*, closed schools which appeared likely to become racially mixed through changes in neighborhood residential patterns. This was sometimes accompanied by building new schools in the areas of white suburban expansion farthest from Negro population centers in order to maintain the separation of the races with a minimum departure from the formal principles of 'neighborhood zoning.' Such a policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races. Upon a proper showing a district court may consider this in fashioning a remedy.

44. *E.g., id.* at 25-26.

45. *Justices Consider When to Declare Districts 'Unitary'*, Education Week (Oct. 10, 1990) at 24.

46. *Id.* at 4064.

47. *Id.*

48. *Board of Education v. Dowell*, 59 U.S. L. W. 4061, 4065 (Jan. 15, 1991). The Court rejected the Justice Department's suggested remand to the Tenth Circuit, instead returning the case to the trial judge for new findings of fact on this issue.

49. *Id.* at 4063.

50. *Id.* at 4064.

51. *Id.* at 4065 (quoting *Green v. New Kent County School Board*, 391 U.S. 430, 435 (1968)).

52. *Id.* at 4065 n.2. The Court did, however, appear to distinguish between residential segregation in some way attributable to the school board and residential segregation deriving from "private decisionmaking." This, as Justice Marshall pointed out in dissent, pays insufficient attention to the roles of state, local officials, and the board in creating what are now self-perpetuating patterns of racial segregation. Even more important, it fails to account for the *unique* role of the School Board in creating 'all-Negro' schools clouded by the stigma of segregation — schools to which white parents would not opt to send their children. That such negative 'personal preferences' exist should not absolve a school district that played a role in creating such preferences from its obligation to desegregate the schools to the maximum extent possible." *Id.* at 4069.

53. *At Justice, a Shift on School Desegregation*, Wash. Post (Jan. 24, 1991).

54. Douglas Interview *supra* note 25.

55. *U.S. Seeks to End Racial Teacher-Assignment Practice*, Education Week (Feb. 1, 1989) at 1.

56. *Vaughns v. Board of Education*, 742 F. Supp. 1275, 1288-89, 1295 (D. Md. 1990).

57. *Id.* at 1292.

58. *Stell v. Savannah-Chatham County Board*, 888 F.2d 82 (11th Cir. 1989).

59. House Committee on Education and Labor, *Staff Report: Investigation of the Civil Rights Enforcement Activities of the Office for Civil Rights, United States Department of Education*, 100th Cong., 2d Sess. (Dec. 1988) [hereinafter cited as "House Staff Report"] at 2.

60. *Id.* at 2-6.

61. Office of Civil Rights, *Response to the Committee on Education and Labor Staff Report*, (Jan. 1989) at 5-37.

62. House Committee on Education and Labor *Hearing on the Federal Enforcement of Equal Education Opportunity Laws*, at 7.

63. Douglas Interview *supra* note 25.

64. These encouraging statements concerning elementary and secondary education sharply contrast with Assistant Secretary Williams' announcement that financial aid targeted to minorities violates the civil rights laws.

65. *E.g.*, Remarks by Michael L. Williams to the National Association of Human Rights Workers, Louisville, Kentucky (Oct. 22, 1990) at 4-5:

> "Today the goal for some is to secure the right mix of students. The strategies include busing, quotas and the redrawing of school attendance zones. I don't have to tell you that school districts around the country have shuffled kids hither and yonder so that little black boys can sit in classrooms next to little white boys.
>
> As tools of integration, these strategies have had questionable success. And in many metropolitan areas, urban demographics have rendered the elimination of predomi-

nantly single-race school all but impossible. No less than 80% of the black students in New York, Illinois and Michigan are in single race schools. The statistics are no better for Hispanic students.

Sadly, school integration schemes are probably as ineffective at improving the academic excellence of students. In 1984, the National Institute of Education found that school integration had failed to improve black achievement in math and had increased black achievement in reading by only two to six weeks.

Busing works when it reflects the conscious choice of individual parents. Every day students in metropolitan communities ride buses to parochial schools known for outperforming neighboring public schools. Busing fails when it works at cross-purposes with the ingredients for good schooling.

Moreover, racial balance plans are disrespectful of the minority community. There is nothing inherently deficient with all-minority classrooms."

66. House Committee on Government Operations, Subcommittee on Human Resources and Intergovernmental Relations, *Failure and Fraud in Civil Rights Enforcement by the Department of Education*, H.R. Rep. 334, 100th Cong., 1st Sess. (Oct. 2, 1987) at 3.

67. *One Nation, Indivisible* at 102-03.

68. Office for Civil Rights, *Ninth Annual Report: FY 1989* (Apr. 24, 1990) [hereinafter cited as "Ninth Annual Report"] at 13.

69. *Id.* at 16.

70. *Id.* at 22.

71. *Id.* at 16, 22.

72. *Id.*

73. *See* House Staff Report, *supra* note 59, at 2.

74. *See* House Committee on Education and Labor, *Hearing on the Federal Enforcement of Equal Educational Opportunity Laws*, 101st Cong., 1st Sess. 312.

75. *Id.* at 6 (testimony of Acting Assistant Secretary for Civil Rights William L. Smith).

76. *See* United States Department of Education, Office of the Assistant Secretary for Civil Rights, *National Enforcement Strategy Office for Civil Rights FYs 1991-1992* (Dec. 11, 1990) [hereinafter cited as "OCR Enforcement Strategy"] at 2. See also part III for a more detailed discussion of OCR's enforcement strategy.

77. In subsequent years, additional plaintiffs challenged OCR's enforcement of Title IX and Section 504; these suits were consolidated with the *Adams* case. Other plaintiffs filed companion challenges to OCR's actions. *See, e.g., Brown v. Califano*, 627 F.2d 1221 (D.C. Cir. 1980).

78. *Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1972), affirming *Adams v. Richardson*, 351 F. Supp. 636, 641 (D.D.C. 1972).

79. *See* House Committee on Government Operations, *Failure and Fraud in Civil Rights Enforcement by the Department of Education*, 100th Cong., 1st Sess. at 6 (Oct. 2, 1987).

80. Office for Civil Rights, *Ninth Annual Report: FY 1989*, at 15.

81. House Staff Report, *supra* note 59, at 3-4, 25-27.

82. *Women's Equity Action League v. Cavazos*, 879 F.2d 880 (D.C. Cir. 1989).

83. *Women's Equity Action League v. Cavazos (II)*, 906 F.2d 742 (D.C. Cir. 1990).

84. *See Hearing on the Federal Enforcement of Equal Educational Opportunity Laws*, at 92-108 (testimony of Elliott Lichtman, Esq., Lichtman, Trister, Singer & Ross).

85. *See Freeman v. Cavazos*, 1990 WESTLAW 141483 (D.D.C. No. 90-2175, Sept. 20, 1990) at 2.

86. *Id.*

87. *Freeman v. Cavazos*, 1990 WESTLAW 157935 (D.D.C. No. 2175, Oct. 5, 1990).

88. *Hearing on the Federal Enforcement of Equal Educational Opportunity Laws*, at 50-51.

89. *Id.* at 52.

90. *See* Office of Civil Rights, *Investigation Procedures Manual* at 69-70.

91. House Committee on Education and Labor, *Hearing on the Federal Enforcement of Equal Education Opportunity Laws*, 101st Cong., 1st Sess. at 81 (Nov. 28, 1989) (testimony of Phyllis L. McClure, Director, Division of Policy and Information, NAACP Legal Defense and Education Fund, Inc.).

92. *See Senate Committee on Labor and Human Resources Hearing: Nomination of Michael L. Williams to be Assistant Secretary for Civil Rights, Department of Education*, 101st Cong., 2d Sess. at 164-65 (May 23, 1990) (response by now-Assistant Secretary Williams to written questions); House Committee on Education and Labor, *Hearing on the Federal Enforcement of Equal Education Opportunity Laws*, 101st Cong., 1st Sess. (Nov. 28, 1989) at 57, 65-66 (testimony of Acting Assistant Secretary Smith).

93. OCR Enforcement Strategy, *supra* note 76, at 8.

94. *Id.* at 2.

95. *Id.* at 8 (emphasis in original).

96. *Id.* at 2.

97. *Id.*

98. *Id.*

99. *Id.* at 3.

100. *Id.*

101. *Id.* at 5.

102. Letter from Michael L. Williams, Assistant Secretary for Civil Rights, to Chief State School Officers (Oct. 15, 1990).

103. Letter from Assistant Secretary Michael L. Williams to Chief State School Officers (Oct. 15, 1990).

104. *See, e.g.*, Memorandum to OCR Senior Staff from William L. Smith, Acting Assistant Secretary for Civil Rights, Subject: Guidance on Application of Section 504 to Children with AIDS in Elementary and Secondary Schools (Apr. 5, 1990); Memorandum to OCR Senior Staff from William L. Smith, Acting Assistant Secretary for Civil Rights, Subject: Guidance on the Application of Section 504 to Noneducational Programs of Recipients of Federal Financial Assistance (Jan. 3, 1990).

105. *See One Nation, Indivisible* at 107-08.

106. Interview, James J. Lyons, National Association on Bilingual Education (Dec. 1990).

107. Remarks of Rep. Robert Martinez, 136 Cong. Rec. H9628 (Oct. 15, 1990).

108. Pub. L. No. 101-476, § 610(j)(vi) (Oct. 30, 1990).

109. Pub. L. No. 101-476, § 610(j)(vi).

110. *Hearings on Nomination of Michael L. Williams, supra* note 93 at 163.

111. Remarks by Assistant Secretary Michael L. Williams at the National Association of Human Rights Workers, Louisville, Kentucky (Oct. 22, 1990), at 9.

112. *See, e.g., Hearing on the Federal Enforcement of Equal Educational Opportunity Laws*, at 229-33 (testimony of Norma Cantu, Director of Elementary and Secondary Programs, Mexican American Legal Defense Fund).

113. *Id.* at 231.

114. OCR Enforcement Strategy, supra note 76 at 2.

115. *Id.* at 4-5.

116. *Hearing: Nomination of Michael L. Williams of Texas to be Assistant Secretary for Civil Rights, Department of Education*, Senate Committee on Labor and Human Resources, 101st Cong., 2d Sess. (May 23, 1990), at 102.

117. 135 Cong. Rec. S16113 (daily ed. Nov. 17, 1989) (remarks of Sen. Harkin).

118. Pub. L. No. 101-476 (Oct. 30, 1990), § 101(a)(1)(A).

119. *Id.* at § 102.

120. *Id.* at § 307

121. *Id.* at § 303.

122. *See* S. Rep. No. 204, Committee on Labor and Human Resources, 101st Cong., 1st Sess., at 4-5.

123. 29 U.S.C .§ 794, as amended by Pub. L. No. 93-112.

124. *One Nation, Indivisible* at 446-47.

125. Office for Civil Rights, *Ninth Annual Report: FY 1989* (April 1990) at 16.

126. *Id.*

127. *Id.* at 23.

128. *Hearing on the Federal Enforcement of Equal Educational Opportunity Laws* at 207 (testimony of David Chavkin, Senior Program Analyst, National Center for Clinical Infant Programs).

129. *Id.* at 209.

130. Pub. L. No. 101-476, § 610(j)(vi)(B)(ii), (iii).

131. *Id.* at § 610()j)(1)(vi)(B)(i).

132. Remarks by Assistant Secretary Michael L. Williams, Assistant Secretary for Civil Rights, to the National Association of Human Rights Workers, Louisville, Kentucky (Oct. 22, 1990), at 9.

133. *OCR Enforcement Strategy, supra* note 76, at 3.

134. Memorandum from Richard D. Komer, Deputy Assistant Secretary of Education for Policy, Office for Civil Rights, to Ted Sanders, Under Secretary, Subject: The Milwaukee Choice Program (Jul. 27, 1990), at 3.

135. *Id.* at Tab B.

136. *Id.* at 2 (quoting 34 C.F.R., part 104, App. A, at 28).

137. *School-Choice Program Is Upheld in Wisconsin*, N.Y. Times, Aug. 8, 1990, at B-6.

138. *Id.* at 1.

Chapter VI

1. OCR also has jurisdiction over Title VI of the Civil Rights Act of 1964 which prohibits discrimination on the basis of race and national origin, Section 504 of the Rehabilitation Act which prohibits discrimination on the basis of handicap and the Age Discrimination Act as well as other civil rights in education laws. The general problems raised regarding OCR's enforcement of Title IX apply to its enforcement activities regarding these other laws as well, although the details vary by subject area.

2. In fact, OCR's only attention to the area of gender-bias in testing has been in a confusing series of decisions regarding separate norming by gender of the Armed Services Vocational Aptitude Battery (ASVAB), a test which is widely used at the high school level in connection with vocational educational programs. The ASVAB, which results in substantially different scores for males and females, has never been conclusively validated for non-military uses and available evidence strongly suggests that it is not valid for a

number of the uses to which it is routinely put. Nonetheless, in a series of compliance reviews, OCR determined that efforts by schools to address the flaws in the test, at least in part, by providing separate scores for males and females so that they could compare the results among their gender group, constituted a violation of Title IX. OCR nowhere addressed the very serious underlying problems with the test. Following these compliance reviews, and apparently following consultation with the Department of Defense which publishes and distributes the ASVAB, OCR reversed its decision through the promulgation of a policy memorandum. Again, it failed to address at all the question of the test's apparent lack of validity.

3. According to OCR's FY 1989 Annual Report, at 9, its appropriations from FY 1985 through FY 1990 have been as follows:

FY 1985	45,000,000
FY 1986	44,580,000
FY 1987	43,000,000
FY 1988	40,530,000
FY 1989	41,635,000
FY 1990	45,178,000

4. Budget figure as of January 15, 1991, made available by OCR staff.

5. Number given by OCR staff, January 22, 1991.

6. According to OCR's Annual Report for FY 1989 it opened 288 compliance reviews in FY 1985, 197 compliance reviews in FY 1986, 240 compliance reviews in FY 1987, 247 compliance reviews in FY 1988 and 138 compliance reviews in FY 1989. Id. at 26.

7. Based on the 1989 annual report, staff levels have declined steadily since 1985. Actual staff numbers for those years are: 913 in FY 1985, 843 in FY 1986, 807 in FY 1987, 808 in FY 1988, and 789 in FY 789. Id. at 9.

8. Figure provided by OCR staff, January 22, 1991.

9. Following is the full text of the President's statement in this regard:

> "In signing this legislation, however, I must take note of two provisions that raise constitutional concerns. First, the Act requires that each state receiving funds must set aside a certain percentage for "Sex Equity Programs" that can be used, among other purposes, for educational activities for girls and women aged 14 through 35. Such activities would, on their face, discriminate on the basis of gender. Since the funding for "Sex Equity Programs" also can be used for other, nondiscriminatory programs, these nondiscriminatory programs will be preferred in administering the legislation. The discriminatory programs will be implemented only if there is a sufficiently strong justification to withstand judicial scrutiny."

10. Title IX does not apply in this case because it exempts military institutions generally, 20 U.S.C. §1681(a)(4), and because it does not apply to the admissions practices of public institutions of education which have been historically single sex, 20 U.S.C. §1681(a)(5). Both characteristics apply to VMI.

Chapter VII

1. Carter and Wilson, "Eighth Annual Status Report on Minorities in Higher Education" at 20-21 [hereinafter cited as "Status Report on Minorities"] (December 1989).

2. *Id.* at iv.

3. *Id.* at 20-21.

4. *See* Marriott, *Black Enrollment in College Up After Long Decline, U.S. Says.* N.Y. Times, Mar. 30, 1990, at A16 [hereinafter cited as "Black Enrollment"].

5. Marriott, *Intense College Recruiting Drives Lift Black Enrollment to a Record.* N.Y. Times, Apr. 15, 1990, at 1, 18 [hereinafter "College Recruiting"].

6. *See, e.g.*, Status Report on Minorities, *supra* note 1, at 22-24.

7. College Recruiting, *supra* note 5, at A1.

8. Black Enrollment, *supra* note 4, at A16.

9. Status Report on Minorities, *supra* note 1, at 8. One such report has linked rising college costs and reduced federal financial assistance to a 13.7% decrease in college-going rates of Hispanic high-school graduates between 1976 and 1986. *Finances Limiting Rate of Hispanics Who Attend College*, Education Week, Nov., 1990, at 2.

10. Status Report on Minorities, *supra* note 1, at iv.

11. *Id.*

12. *Id.* at 26.

13. *Id.* at 27.

14. *Id.* at 28.

15. Levine, "Demographics of Higher Education: Redefining the Problem," *Harvard Graduate School of Education Alumni Bulletin*, Summer 1990, at 15.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.* at 15-16.

20. The decision came eleven months after the Court of Appeals had reversed a district court order dismissing *Adams*

and ordered further hearings on the standing issue. See Jaschik, *Lawsuit Forcing U.S. to Monitor Colleges on Race is Revived,* Chronicle on Higher Education, Jul. 19, 1989, at A1, A16.

21. *See* Jaschik, *Appeals Court Dismisses Landmark 1970 Lawsuit on College Desegregation,* Education Week, July 5, 1990, at A1, A22 [hereinafter "Lawsuit on College Desegregation"].

22. In 1988, the U.S. Department of Education found that Arkansas, North Carolina, South Carolina and West Virginia had come into compliance with Title VI. In 1989, the Department ruled that Georgia, Missouri and Oklahoma were also in compliance. *See* Lawsuit on College Desegregation, *supra* note 21, at A1, A16. Moreover, since the dismissal of *Adams* the Assistant Secretary of Education has indicated that OCR will modify its policy of adherence to the court-ordered time limits imposed by the courts. *See* Miller, *Williams Charts a New Agenda for Rights Office,* Chronicle of Higher Education, Sept. 5, 1990, at 1, 41.

23. *Ayers v. Allain,* 914 F.2d 676, slip op. at 27 (5th Cir. 1990)(en banc).

24. 391 U.S. 430 (1968).

25. *Id.* at 437-38.

26. 478 U.S. 385 (1986).

27. These figures are contained in the decision of the three-judge panel, *Ayers v. Allain,* 893 F.2d 732 (5th Cir. 1990), which the Fifth Circuit, en banc, reversed.

28. They appear in the decision of the three-judge panel that the en banc ruling reversed.

29. "If black citizens in Mississippi may choose among any of the eight universities in the state, it is no denial of their right to equal protection that certain institutions formerly segregated by law continue to provide a more limited range of educational options than other institutions in the state." *Ayers v. Allain,* slip op. at 29.

30. *See Geier v. Alexander,* 801 F.2d 799 (6th Cir. 1986); *United States v. State of Louisiana,* 692 F. Supp. 642 (E.D. La. 1988), *cert. denied,* 488 U.S. 161 (1989); and the panel decision in Ayers itself, *Ayers v. Allain,* 893 F.2d 732 (5th Cir.), *rev'd,* 914 F.2d 676 (5th Cir. 1990)(en banc).

31. 642 F. Supp. at 657. Judge Higgenbotham, dissenting in *Ayers,* makes a similar point. *Ayers v. Allain,* 914 F.2d at slip op., at 4 (Higgenbotham, J., dissenting).

32. *Id.* at 656. *See also Geier v. Alexander,* 801 F.2d at 801-02.

33. *See United States v. State of Louisiana,* C.A. No. 80-3300A, slip. op. (E.D. La. October 30, 1990).

34. These orders, based on a legal interpretation flatly at odds with that of *Ayers,* required, among other things, a new organizational scheme for public higher education institutions in Louisiana, the adoption of selective admissions at certain institutions, the modification of institutional missions, and the merger of the Southern University and LSU schools of law. *See United States v. State of Louisiana,* 692 F. Supp.at 642.

35. *See, e.g., Alabama State Teachers Ass'n v. Alabama Public School and College Authority,* 289 F. Supp. 784 (M.D. Ala. 1968), *aff'd per curiam,* 393 U.S. 400 (1969); *Norris v. State Council of Higher Education for Virginia,* 327 F. Supp. 1368 (E.D. Va.), *aff'd per curiam,* 404 U.S. 907 (1971); *Geier v. Alexander,* 801 F.2d 799 (6th Cir. 1986); *United States v. State of Alabama,* 628 F. Supp. 1137 (N.D. Ala. 1985), *rev'd on other grounds,* 828 F.2d 1532 (11th Cir. 1987), *cert denied sub nom. Board of Trustees of Alabama State University v. Auburn University,* U.S., 108 S. Ct. 2857 (1988); and *Adams v. Richardson,* 480 F.2d 1159 (D.C. Cir. 1973).

36. Pub. L. No. 100-259, 42 U.S.C. §2000d-4a (1988).

37. 465 U.S. 555 (1984).

38. *See United States v. State of Alabama,* 628 F. Supp. at 1137.

39. *See United States v. State of Louisiana,* 692 F. Supp. at 642; *Ayers v. Allain,* 914 F. 2d at 676.

40. *Id.*

41. Wiener, *Free Speech for Campus Bigots?,* The Nation, Feb. 26, 1990, at 272.

42. *Id* at 273.

43. Johnson, *At Wesleyan, a Day to Reflect on Racial Tension,* N.Y. Times, May 9, 1990.

44. Wilkerson, *Racial Harassment Altering Blacks' Choices on Colleges,* N.Y. Times, May 9, 1990, at A1 [hereinafter cited as "Racial Harassment"].

45. *Id.*

46. *Id.*

47. Fiske, *Fabric of Campus Life Is in Tatters, a Study Says,* N.Y. Times, Apr. 30, 1990, at A15.

48. *See, e.g.,* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story,* 87 Mich. L. Rev. 2320 (August 1989); Lawrence, *The Debates Over Placing Limits on Racist Speech Must Not Ignore the Damage It Does to Its Victims,* Chronicle of Higher Education, Oct. 23, 1989, at B1-B2; Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling,* 17 Harv. C.R.-C.L. L. Rev. 133 (1982).

49. Racial Harassment, *supra* note 44, at A1.

50. Miller, *Williams Charts a New Agenda for Rights Office,* Chronicle of Higher Education, Sept. 5, 1990, at 1, 41.

51. *See White House Plans to Review Ban on Scholarships Based on Race,* Chronicle of Higher Education, Dec. 19, 1990, at A1, A20.

52. Wilson, *Colleges' Anti-Harassment Policies Bring Controversy Over Free-Speech Issues*, Chronicle of Higher Education, Oct. 4, 1989, at A1, A38.

53. Genachowski, *Recent Case: First Amendment — Racist and Sexist Expression on Campus — Court Strikes Down University Limits on Hate Speech*, 103 Harv. L. Rev. 1397 (April 1990) [hereinafter cited as "Recent Case"].

54. U.W.S. §17.06(2)(a).

55. Hentoff, *Stanford and the Speech Police*, Wash. Post, Jul. 21, 1990.

56. Sunder, *Censor or Censure? Harvard Chooses the Latter*, Harvard Crimson, Commencement 1990, at B5.

57. Finn, *The Campus: An Island of Repression in a Sea of Freedom, Commentary*, Sept. 1989, at 17.

58. Wiener, *supra* note 41, at 274.

59. Although private universities are not bound by the First Amendment of the Constitution because of a lack of requisite state action, many such schools have institutional policies that afford protections similar to those students and faculty members enjoy at public institutions.

60. *Doe v. University of Michigan*, 721 F. Supp. 852 (E.D. Mich. 1989). The court found that the policy was overbroad, because it swept within its scope a significant amount of "verbal conduct" or "verbal behavior" that is protected by the First Amendment and because certain of its terms ("stigmatize" and "victimize") elude precise definition.

61. For an excellent discussion of this subject, *see* Recent Case, *supra* note 53.

62. *See, e.g.*, Matsuda, *supra* note 48.

63. *See, e.g.*, Lawrence, *supra* note 48; Tatel, *Clear, Narrow Policies on Offensive Speech May Not Run Afoul of the First Amendment*, Chronicle of Higher Education, Feb. 7, 1990, at B1-B3.

64. *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

65. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

66. *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986).

67. *See* Lawrence, *supra* note 48.

68. *Dartmouth Review v. Dartmouth College*, 889 F.2d 13 (1st Cir. 1989).

69. *See* Crovitz, *Intolerance and the Dartmouth Review*, Wall St. J., Dec. 28, 1988.

70. *Id.*

71. According to Ira Glasser, National Executive Director of the American Civil Liberties Union, "[w]e still live in a racist society, which is why you can't trust the people in power to make distinctions about which speech should be permitted." If speech can be punished or suppressed, he contends, "Louis Farrakhan is likely to be the first." Wiener, *supra* note 41, at 274.

72. *Id.* at 273.

73. Memorandum from Joan Standlee, Deputy Assistant Secretary for Civil Rights to Gilbert Roman, Regional Director, Region VIII, Office for Civil Rights, dated March 22, 1983.

74. Letter from Michael Williams to John Junker, dated December 4, 1990.

75. *Id.*

76. Jaschik, *Scholarships Set Up for Minority Students Are Called Illegal*, Chronicle of Higher Education, Dec. 12, 1990, at A1, A20.

77. The reaction was one of anger, disbelief and even defiance. Marriott, *Move Against Minority Aid is Debated*, N. Y. Times, Dec. 14, 1990, at B6.

78. U.S. Department of Education, "Department Issues Policy Statement on Race-Exclusive Scholarships," Press release dated December 18, 1990.

79. The comments of Robert Atwell, president of the American Council on Education, which represents some 1,600 higher education institutions, were typical: "We hope the administration recognizes the error of this approach and the foolishness of pursuing such a policy. If not, we certainly hope Congress will undertake to reverse the policy and deny the administration the opportunity of putting it into effect." David Tatel, who directed OCR during the Carter administration, criticized both the substance of the decision and the fact that it had been made without any factfinding or public consultation. Frisby, *Scholarships Retreat Fails to Stem the Furor*, Boston Globe, Dec. 20, 1990, at 1.

80. *See, e.g.*, Jaschik, *New Federal Challenge to Programs for Minorities Seen in Education Dept. Memo on Oregon Plan*, Chronicle of Higher Education, Jan. 16, 1991, at A1, A39 [hereinafter cited as "Oregon Plan"].

81. U.S. Department of Education, *supra* note 78, at paragraph 2.

82. *Id.*

83. *Id.* at paragraph 3.

84. Cooper, *Colleges See Minority Grants as Key Signal*, Wash. Post, Dec. 23, 1990, at A4 [hereinafter cited as "Key Signal"].

85. These include the Patricia Roberts Harris Fellowships and the National Science Foundation's minority scholarship fund, both of which support minority students' graduate study. Lauter, *Rule is Voided on Scholarships; Naivete Cited*, Los Angeles Times, Dec. 19, 1990, at 1 [hereinafter cited as "Rule is Voided"].

86. *Id.*

87. *Id.*

88. In announcing the revised policy, he said that his initial position had been "legally right but politically naive."

89. *See* Kurtz, *Scholarships: The Yes, No & Maybe Stories,* Wash. Post, Dec. 20, 1990, at D1.

90. De Witt, *U.S. Lets Stand Curb on College Aid Keyed to Race,* N. Y. Times, Dec. 19, 1990, at A1, B7.

91. Wood, *The Education Department's Attempt to Reinvent America,* Christian Science Monitor, Dec. 27, 1990, at 19.

92. According to William Taylor, "This distinction [between institutional funds and private funds administered by an institution] is based on nothing we know in terms of legal precedent." Taylor said the distinction would not withstand judicial scrutiny, especially in light of the Civil Rights Restoration Act. Bronner, *Minority Scholarship Curbs Delayed,* Boston Globe, Dec. 19, 1990, at 3. Connie Rice and Daniel Fleshler, of the Legal Defense Fund, agree: "If it were illegal for universities to fund minority-designated scholarships — which it is not — then it would also be illegal for them to administer [such] scholarships as well." Rice and Fleshler, *That Society is Color Blind is an American Myth,* L. A. Times, Dec. 26, 1990, at B5.

93. "Williams conceded that the distinction between donated funds and a school's own funds was not based on any particular legal theory. The department wanted to 'provide some flexibility' to schools, he said." Lauter, *supra* note 85, at 1.

94. *See* section D *infra* for discussion of this issue.

95. *See* section C *infra.*

96. *See* section C *infra.*

97. U.S. Department of Education, *supra* note 78, at paragraph 3.

98. Rule is Voided, *supra* note 85, at 1.

99. It is true, of course, that Supreme Court decisions interpreting the equal protection clause affect affirmative action programs operated by governmental entities. This does not mean, however, that Title VI does not also apply; indeed, much conduct that violates the equal protection clause violates Title VI as well. Neither do Supreme Court decisions interpreting the Constitution and/or Title VI strip OCR of its authority; on the contrary, once the Supreme Court has interpreted a statute for which OCR has enforcement authority, it becomes OCR's duty to enforce the law consistent with that interpretation. It is simply incorrect for OCR to contend that it lacks authority over publicly funded minority scholarship programs.

100. ". . .President Bush seemed to be almost praying that someone would take this hot potato off his hands and toss it into a court. 'I would like to think that the matter can be resolved with finality this way,' he said, referring to the Education Department's revision. 'But I don't think that's what we've done. I think there'll probably be some court challenges to this.' Hint. Hint." Editorial, *Try Fairness in College Scholarships,* Chicago Tribune, Dec. 23, 1990, at 2.

101. "There is no question that this is not over," said John Scully of the Washington Legal Foundation, which initially prompted OCR's minority scholarship initiative. Lauter, *supra* note 85.

102. *See* Oregon Plan, *supra* note 80.

103. Williams letter to John Junker, dated December 4, 1990, at 2.

104. U.S. Department of Education, *supra* note 78, at paragraph 2.

105. Flint and Cohen, *Minority Scholarship Ban Seems to Affect Very Few,* Boston Globe, Dec. 21, 1990, at 1 [hereinafter cited as "Minority Scholarship Ban"].

106. *Id.*

107. *Id.*

108. Minority Scholarship Ban, *supra* note 105.

109. *Id.* (discussing policies of institutions in the Boston area).

110. *Clarification Series,* Wash. Post, Dec. 21, 1990, at A3.

111. Cooper, *Scholarship Policy Called Not Binding,* Wash. Post, Dec. 20, 1990, at A20 [hereinafter cited as "Not Binding"]. The College Board also reports that "the number of institutions offering such scholarships is on the rise: Between the 1987-88 and 1990-91 school years, responding institutions giving scholarships to minorities without regard to financial need rose from 15 percent to 24 percent. In the same period, schools considering minority status in giving scholarships based on financial need rose from 16 percent to 27 percent." Kelly, *More Colleges Give Minority Scholarships,* USA Today, Dec. 26, 1990, at 8D.

112. *Id.*

113. Key Signal, *supra* note 84.

114. Examples include those provided by the United Negro College Fund, the National Merit Scholarship Corporation, and minority scholarships provided by local private groups. *See* Not Binding, *supra* note 111; and Rule is Voided, *supra* note 85.

115. Rule is Voided, *supra* note 85.

116. Key Signal, *supra* note 84.

117. *Id.*

118. *Id.*

119. If it becomes clear that OCR means to prohibit only scholarships that are based solely on race, it may be possible to modify programs that meet that description to incorporate consideration of other factors as well: "Even those institutions with strictly race-based scholarships could easily skirt the ban by rewriting program descriptions to include other factors, some officials noted." Minority Scholarship Ban,

supra note 105. It is beyond the scope of this paper, however, to consider how difficult it would be to make such modifications or what interests would be frustrated in doing so.

120. These include: (1) whether, as OCR contends, a federal fund recipient may administer programs funded by private contributions even if it would be illegal for the recipient to fund the programs itself; and (2) whether, as OCR contends, Supreme Court decisions on affirmative action mean that OCR cannot "address administratively" minority scholarship programs that are funded publicly. As noted above, OCR's legal positions on both issues are dubious.

121. Hearings before the House Committee on Education and Labor, Dec. 19, 1990, at 5 and 6 (Statement of David S. Tatel).

122. *Id.* at 2-3.

123. Summary of Requirements of Title VI of the Civil Rights Act of 1964 for Institutions of Higher Education, paragraph 6, transmitted to presidents of institutions of higher education participating in federal assistance program by Stanley Pottinger, Director, Office for Civil Rights, by memorandum dated June 1972.

124. *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978). In *Bakke*, the Supreme Court ruled that a university may accord a preference to minority applicants for admission if it seeks either to remedy the effects of its own past discrimination or to achieve a diverse student body. As long as the school does not reserve certain seats for minority candidates, the Court ruled, such preferences are consistent with the Constitution and Title VI, even if the result is to deny admission to better qualified white candidates.

125. *See* 44 Fed. Reg. 53509 (1979).

126. As noted above, OCR's basic position during this period has been that minority scholarships are permissible if: (a) a university is not adequately serving members of a particular racial or nationality group, and (b) the minority scholarship program "does not limit nonminority students from applying and qualifying for the major proportion of financial assistance administered by the school." Memorandum from Joan Standlee, *supra* note 73.

127. Letter from Robert Randolph, Acting Director, Office for Civil Rights for Region I, to the complainant in file number 01-80-2046, dated September 30, 1981 (quoting 34 C.F.R. section 100.5(1)).

128. Title IX of the Higher Education Act, 20 U.S.C. § 1134e(d)(3).

129. Letter from Burton Taylor, Director, Division of Postsecondary Education, Office for Civil Rights, to complainant in number 01802046, dated March 24, 1982.

130. Memorandum from Anthony Califa, Director for Litigation, Enforcement and Policy Services, Office for Civil Rights, to Robert Randolph, Acting Director, Office for Civil Rights for Region I, dated September 11, 1981.

131. Memorandum from Joan Standlee, *supra* note 73.

132. *Id.* at 1-2.

133. *Id.* at 2.

134. Letter from Alicia Coro, Acting Assistant Secretary for Civil Rights, to an unnamed institution, dated May 2, 1986. The logic suggests that OCR would have reached a different result had potential beneficiaries belonged to a group that has been discriminated against.

135. Letter from Thomas J. Burns, Regional Civil Rights Director, Office for Civil Rights, to Lisa Baer, Esq., dated March 17, 1988.

136. *Metro Broadcasting, Inc. v. Federal Communications Commission*, 110 S. Ct. 2997, 3010 (1990).

137. Somewhat ironically, the University of Alabama and the University of Louisville, the schools whose students stood to benefit from the Fiesta Bowl's minority scholarship awards, are both institutions that once illegally excluded black students. The arrangement OCR challenged, therefore, is one that would have served two interests recognized by the Supreme Court as compelling.

138. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 109 S. Ct. 706 (1989).

139. While national statistics are not available at present, data presented in section C *supra* suggest that minority scholarship funds are only a small portion of total financial assistance. Moreover, OCR's policy covers all minority scholarship programs, regardless of what portion of total assistance they constitute.

140. Letter from Michael Williams, note 75 *supra*.

141. Jaschik, *Colleges Fear Debate on Minority Scholarships May Fuel Racial Tension*, Chronicle of Higher Education, Jan. 9, 1991, at A1, A32.

142. *Id.* at A32.

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* at A1.

147. De Witt, *Harvard Cleared in Inquiry on Bias*, N. Y. Times, Oct. 7, 1990, at 35.

148. *Id.*

149. *See, e.g.*, "Study Questions College Admissions Rates of Asian Americans." *Stanford University Campus Report*, May 20, 1987 (quoting an article by John Bunzel and Jeffrey Au, *The Public Interest*, Spring 1987.)

150. Jaschik, *U.S. Finds Harvard Did Not Exclude Asian Americans*, Chronicle of Higher Education, Oct. 17, 1990, at A1, A26 [hereinafter cited as "Jaschik"].

151. *See, e.g.*, *Larry P. v. Riles*, 793 F.2d 969 (9th Cir. 1984).

152. *See* Jaschik, *supra* note 150.

153. *Id.*

154. *See Larry P. v. Riles, supra* note 151.

155. OCR letter to Derek Bok, quoted in Jaschik, *supra* note 150, at A16.

156. *Id.*, (quoting Terry Holcombe, Vice President, Development and Alumni Affairs, Yale University.)

157. *Id.* (quoting Professor Ronald Takaki, University of California at Berkeley).

158. Mary Francis Berry, a member of the U.S. Commission on Civil Rights, notes that when black and Hispanic students are denied admission to selective institutions, test scores are usually the reason cited. When Asian-Americans with outstanding test scores are rejected, however, "they give them all these other reasons." *Id.*

159. *Id.* (quoting Professor Ling-chi Wang, of University of California at Berkeley).

160. *Id.*

161. De Witt, *U.S. Expands Inquiry of College Bias*, N.Y. Times, Oct. 3, 1990, at A10.

162. *Id.*

163. *Id.*

164. *Id.*

165. Jaschik, *Asian Americans Call for Further Federal Inquiries Into College Policies That Result in Discrimination*, Chronicle of Higher Education, Oct. 17, 1990, at A26.

166. De Witt, *supra* note 147.

167. Jaschik, *supra* note 165.

Chapter VIII

1. Census Bureau, U.S. Department of Commerce, Current Population Reports, Consumer Income, Series P-60, no. 166.

2. *See generally* Withers and Winston, "Equal Employment Opportunity," *One Nation, Indivisible* at 191-93 (1989).

3. The Hudson Institute, *Workforce 2000: Work and Workers for the 21st Century* 89 (1987).

4. *Id.*

5. Bureau of Labor Statistics, U.S. Department of Labor, Employment in Perspective: Women in the Labor Force, Rep. No. 747 at 2 (3d qtr. 1987).

6. *A Shared Concern*, Seattle Times, Jun. 24, 1990, at K2 (quoting Michael Creedon of the National Council on Aging).

7. For a more extensive discussion of legislative proposals in the 101st Congress concerning equal employment opportunity and work-and-family issues, *see* Women's Legal Defense Fund, "The Legislative Glass Ceiling: The 101st Congress' Record on the Women's Agenda" (1991) [hereinafter cited as "The Legislative Glass Ceiling"].

8. The Americans with Disabilities Act is discussed extensively in Chapter XII of this report.

9. As then-candidate George Bush told a group of Republican women in Illinois, "We need to assure that women don't have to worry about getting their jobs back after having a child or caring for a child during a serious illness. This is what I mean when I talk about a kinder, gentler nation." *Bush to Address Parental Leave, Wage Floor*, Wash. Post, Sept. 11, 1988, at A20.

10. Select Committee on Children, Youth, and Families, Report on Hearing on "Work in America: Implications for Families" 4 (April 17, 1986).

11. *See* Winston and Withers, *One Nation, Indivisible*, *supra* note 2.

12. Women's Legal Defense Fund, "The Legislative Glass Ceiling," *supra* note 7, at 10-11.

13. *See* Withers and Winston, *One Nation, Indivisible* at 200-206 (1989).

14. *UAW v. Johnson Controls, Inc.*, 886 F.2d 871, 920 (7th Cir. 1989) (Easterbrook, J., dissenting).

15. Majority Staff of the House Committee on Education and Labor, *Report on the EEOC, Title VII, and Workplace Fetal Protection Policies in the 1980s*, 3, 12-26 (1990) [hereinafter cited as "*Report on the EEOC*." The 1988 policy guidance disregarded the plain language of Title VII to find that facial sex-based discrimination could be justified by the "business necessity" defense, even while acknowledging that the much tougher BFOQ defense was normally required in such cases. It even expanded the business necessity defense to allow discriminatory policies that were unrelated to the employee's ability to perform the job in question, again contrary to settled case law. The policy guidance also adopted gender-discriminatory assumptions of fetal health risks, minimizing the health risks posed to male workers and their offspring. *EEOC Policy Guidance on Reproductive and Fetal Hazards*, Daily Labor Report (BNA) No. 193 at D-1 (Oct. 5, 1988).

16. *Report on the EEOC*, *supra* note 15, at 27-29.

17. *See* Daily Labor Report (BNA) at D-1 (Jan. 26, 1990).

18. 110 S. Ct. 577 (1990).

19. Women Employed Institute, *EEOC Enforcement Statistics* (1990).

20. *Id.*

21. *Id.*

22. *See* General Accounting Office, *EEOC and State Agencies Did Not Fully Investigate Discrimination Charges*

10-22 (1988) (finding that 41-82% of charges closed by the EEOC with a no-cause determination had not been fully investigated).

23. *EEOC Enforcement Statistics, supra* note 19.

24. *Examination on Issues Affecting Women in Our Nation's Labor Force: Hearings Before the Senate Comm. on Labor and Human Resources*, 97th Cong., 1st Sess. (1981) (statement of Betty Jean Hall, Director, Coal Employment Project).

25. *Board of Governors of the University of North Carolina v. Department of Labor*, No. 89-3359 (4th Cir. 1990).

26. *Stouffer Foods Corp. v. Dole*, No. 7:89-2149-3 (E.D.S.C. Nov. 1990). A similar challenge, *US Air v. Dole*, No. 90-2505 (4th Cir. 1990) was dismissed by the Eastern District court in Virginia.

27. Women Employed Institute, *Summary of OFCCP Enforcement Activity* (1990).

28. For a more detailed discussion of the Department of Justice under the Reagan Administration, see Withers and Winston, *One Nation, Indivisible* at 195-200.

29. 58 U.S.L.W. 5053 (1990). Fortunately, the Supreme Court ruled against the Department's position; the Court held that benign race-conscious measures mandated by Congress are constitutionally permissible to the extent that they are substantially related to the achievement of important governmental objectives.

30. This section on federal sector EEO enforcement draws heavily from the work of Sadhna Govindarajulu in her memorandum, "Employment Discrimination in the Federal Government."

31. *Processing of EEO Complaints in the Federal Sector: Problems and Solutions: Hearing Before a Subcomm. of the House Comm. on Government Operations*, 100th Cong., 1st Sess. 8 (1987).

32. *Id.* at 3.

33. For an extensive discussion of the federal EEO complaint processing system and critique of the EEOC's proposed regulations, see "Comments Regarding the EEOC's Section 1614 Proposal to Restructure the Federal Sector EEO Administrative Complaint Process," filed by a coalition of civil rights, women's, and labor groups and available from the Women's Legal Defense Fund (January 2, 1990).

Chapter IX

1. The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. §§ 621 *et seq.* [hereinafter cited as "ADEA"].

2. *Public Employees Retirement System of Ohio v. Betts*, 109 S. Ct. at 2859.

3. *Betts v. Hamilton County Board of Mental Retardation and Developmental Disabilities*, 848 F.2d 692, 694 (6th Cir. 1988).

4. The original regulations were set forth at 29 C.F.R. § 860.120 (1979). Following the transfer of administrative and enforcement authority over the ADEA from the Department of Labor to the Equal Employment Opportunity Commission, the regulations were continued in effect and ultimately renumbered to appear at 29 C.F.R. § 1625.10 (1989).

5. *Id.* quoting *Karlen v. City Colleges of Chicago*, 837 F.2d 314, 319 (7th Cir.), *cert. denied*, 486 U.S. 1044 (1988).

6. *Id.* at 695.

7. Section 4(f)(2) of the ADEA reads, in pertinent part, as follows:

> It shall not be unlawful for an employer, employment agency or labor organization —
>
> (2) to observe the terms of a bona fide seniority system or any bona fide employee benefit plan such as a retirement, pension, or insurance plan, which is not a subterfuge to evade the purposes of this chapter . . .

8. *See, e.g. Betts v. Hamilton County Board of Mental Retardation*, 848 F.2d 692 (6th Cir. 1988); *EEOC v. City of Mt. Lebanon*, 842 F.2d 1480 (3d Cir. 1988); *Karlen v. City Colleges of Chicago*, 837 F.2d 314 (7th Cir. 1988); *Cipriano v. Board of Education of North Tonawanda School District*, 785 F.2d 51 (2d Cir. 1986); *EEOC v. Westinghouse Electric Corp.*, 725 F.2d 211 (3d Cir. 1983), *cert. denied*, 469 U.S. 820 (1984); *EEOC v. Bordens Inc.*, 724 F.2d 1390 (9th Cir. 1984); *Mason v. Lister*, 562 F.2d 343 (5th Cir. 1977).

9. *See* 29 C.F.R. § 1625.10 (1989).

10. Testimony of R. Gaull Silberman, *Joint Hearing Before The Subcommittee on Labor of the Committee on Labor and Human Resources and the Special Committee on Aging*, U.S. Senate, S. Hrg. 101-308 at 61 (Sept. 27, 1989).

11. *See* April 2, 1990 Joint letter from Congressman Roybal, Hawkins, Clay and Martinez to Roger B. Porter, Assistant to the President for Economic and Domestic Policy, at 1.

12. March 27, 1990 Joint letter from Roger B. Porter , Assistant to the President for Economic and Domestic Policy, to Congressman William Goodling.

13. *See supra* note 10, at 60.

14. "The Older Workers' Benefit Protection Act," Senate Committee on Labor and Human Resources, S. Rep. No. 101-263, 101st Cong., 2nd Sess., at 2 (1990).

15. *See supra* note 12.

16. *See supra* note 10, at 68 (testimony of EEOC General Counsel Charles A. Shanor). Mr. Shanor specifically endorsed those provisions in the bill that would have applied the amendments to pending cases. *Id.* at 73.

17. Pub. L. No. 101-433, § 103(F)(3).

18. *Id.* at § 103(l)(2).

19. The bill reported out of the Senate Committee on Labor and Human Resources, S. 1511, stated that "it shall not be unlawful to observe the terms of a bona fide voluntary early retirement incentive plan that furthers the purposes of this Act . . . ."

20. Pub. L. No. 100-283 (April 7, 1988).

21. The Age Discrimination Claims Assistance Amendments of 1990, Pub. L. No. 101-504, 104 Stat. 2287.

22. *See supra* note 16.

23. *Id.* at 63, 69.

24. *See EEOC v. State of Massachusetts*, 858 F.2d 52 (1st Cir. 1988); *EEOC v. State of Vermont*, 904 F.2d 794 (2d Cir. 1990).

25. *See One Nation, Indivisible: The Civil Rights Challenge for the 1990s*, Report of the Citizens' Commission on Civil Rights, at 187.

Chapter X

1. 8 U.S.C. § 1324a(j).

2. Government Accounting Office (GAO), Immigration Reform: Employer Sanctions and the Question of Discrimination (Mar. 1990) (GAO/GGD-90-62) [hereinafter cited as "GAO Report"].

3. GAO Report at 38.

4. GAO Report at 43. Incredibly, 5% of employers- some 227,000 representing 1.1 million hires nationwide in 1988 - were willing to admit on their mail-in response form that IRCA had prompted them to refuse jobs to persons because of foreign appearance or accent. *Id.* at 41.

5. GAO Report at 47-48. Even these high figures tend to underreport the difference in treatment because they mask subtle discrimination observed by the testers but not captured by GAO's statistics. *Id.* at 49.

6. GAO Report at 90.

7. GAO Report at 61.

8. House Judiciary Comm., Subcomm. on Immigration, Refugees, and International Law (June 27, 1990) (statement of Arthur A. Fletcher, Chairman, U.S. Commission on Civil Rights).

9. *Clocking Immigration Sanctions*, Wall St. J., Apr. 16, 1990, at A12.

10. S. Hodge, *A National Identity Card: Inching Toward Big Brother*, The Heritage Foundation (May 29, 1990).

11. Task Force on IRCA-Related Discrimination, Report and Recommendations (Sept. 1990) [hereinafter cited as "Task Force Report"].

12. Task Force Report at 5 & Appendix 1.

13. Task Force Report at 43-47.

14. Task Force Report at 47.

15. IRCA expressly provides, "Nothing in this [sanctions] section shall be construed to authorize, directly or indirectly, the issuance or use of national identification cards or the establishment of a national identification card." 8 U.S.C. § 1324a(c).

16. *See, e.g.*, Press Release, McDonnell Douglas Charged With Employment Discrimination (Dec. 17, 1990).

Chapter XI

1. Office of Minority Health, Department of Health and Human Services, *Closing the Gap: Health and Minorities in the U.S.* 1 (1990).

2. *Id.*

3. *Id.*

4. *Id.*

5. Council Report, *Black-White Disparities in Health Care*, 263 Journal of the American Medical Association 2344 [hereinafter cited J. A.M.A] (1990).

6. Telephone interview with Ken Kochanek, Vital Statistics Division, Mortality Branch, National Center for Health Statistics (Aug. 13, 1990).

7. Office of Minority Health, Department of Health and Human Services, *Closing the Gap: Infant Mortality, Low Birthweight, and Minorities* 1 (1990).

8. *Id.* at 3.

9. *Id.*

10. Office of Minority Health, Department of Health and Human Services, *Closing the Gap: Diabetes and Minorities* 2 (1990).

11. *Id.*

12. Office of Minority Health, Department of Health and Human Services, *Closing the Gap: Cancer and Minorities* 2 (1990).

13. *Id.*

14. *Id.*

15. *Id.* at 3.

16. *Id.*

17. *Id.*

18. Fiscal Year 1991 Budget, U.S. Department of Health and Human Services 5 (January 29, 1990).

19. *Id.* at 6.

20. *Id.*

21. *Id.* at 20

22. *Id.*

23. *Id.* at 39.

24. *Id.*

25. *See* Wash. Post, Feb. 21, 1990, at A3 (citing report released by Secretary Sullivan, Feb. 20, 1990).

26. *See* Surgeon General, U.S. Department of Health and Human Services, Reducing the Health Consequences of Smoking: 25 Years of Progress 269 (1989).

27. *See* Economist, April 28, 1990, at 28 (referencing a New England Journal of Medicine article).

28. *See* Office of Inspector General, Department of Health and Human Services, Youth Access to Cigarettes i (May 1990).

29. *See* Wash. Post, *supra* note 25.

30. For example, on February 20, 1990, Sen. Edward M. Kennedy introduced the Tobacco Product Education and Health Protection Act. On March 1, 1990, Rep. Thomas Luken, Chair of the Subcommittee on Transportation and Hazardous Materials of the Energy and Commerce Committee held a hearing on the Protect Our Children from Cigarettes Act of 1989. On July 12, 1990, the Subcommittee on Health and the Environment of the House Energy and Commerce Committee held a hearing on the Tobacco Control and Health Protection Act.

31. A recent report by the Inspector General of the Department of Health and Human Services found that although 44 states and the District of Columbia have laws banning the sale of cigarettes to minors, those laws are almost never enforced. During 1989, there were only 32 known reported violations of these laws, while an estimated one billion packs of cigarettes were sold to minors. *See* Office of Inspector General, Department of Health and Human Services, Youth Access to Cigarettes, 1, #3 (May 1990).

32. *See* Hearings before the House Subcommittee on Health and the Environment (July 12, 1990) (statement of James O. Mason, Assistant Secretary for Health, Department of Health and Human Services).

33. Goldsmith, *Fight Against Tobacco Addiction Moving Into International Arena*, 263 J. A.M.A. 2989 (1990).

34. *Id.*

35. *Id.* at 2990.

36. *Id.*

37. Office of Minority Health, Department of Health and Human Services, *Closing the Gap: Homicide, Suicide, Unintentional Injuries, and Minorities* 2 (1990).

38. Office of Minority Health, Department of Health and Human Services, *Closing the Gap: AIDS/HIV Infection and Minorities* 1 (1990).

39. 42 U.S.C. § 1396a(l) (as amended by the Omnibus Budget Reconciliation Act of 1989, P.L. 101-239).

40. 42 U.S.C. § 1396a(1) (as amended by the Medicare Catastrophic Coverage Act of 1988, P.L. 101-234).

41. *HHS Criticized for Covering Up Infant Mortality Recommendations*, 44 Medicine & Health 1 (1990).

42. *See* Pear, *Study Says U.S. Needs to Battle Infant Mortality*, N.Y. Times, Aug. 6, 1990, A1.

43. *Id.*

44. Pear, *supra* note 42, at B9.

45. *See* Kirschten, *Don't Bill Us*, Nat. Jour., Dec. 12, 1989, at 3044.

46. 42 U.S.C. § 701.

47. Section 6508 of P.L. 101-239, codified at 42 U.S.C. § 701 note.

48. *See* Pear, *supra* note 42, at B9, col. 1.

49. *Id.*

50. *Id.*

51. *See* The National Commission to Prevent Infant Mortality, *Troubling Trends: The Health of America's Next Generation* (1990) [hereinafter cited *Troubling Trends*]; Institute of Medicine, *Prenatal Care: Reaching Mothers, Reaching Infants* (1988) [hereinafter cited *Reaching Mothers*].

52. *Caring for New Mothers: Pressing Problems, New Solutions*, 2 The Safety Net 4, (1990).

53. *Id.*

54. *See* Pear, *supra* note 42 at B9.

55. *See Troubling Trends, supra* note 51, at 21-27.

56. *Drug Treatment*, 16 Health Legis. & Reg. no. 26, at 2 (1990).

57. *See Troubling Trends, supra* note 51 at 21.

58. *See* Hoffman, *Pregnant Addicts Turned Away: ACLU Files Suit on Their Behalf*, The Village Voice, Apr. 3, 1990, at 3.

59. *Drug Treatment, supra* note 56 at 2.

60. *See* The Alan Guttmacher Institute, *Blessed Events and the Bottom Line: Financing Maternity Care in the United States*, 44-45 (1987).

61. *Troubling Trends, supra* note 51, at 23.

62. *See* G. Annas, S. Law, R. Rosenblatt & K. Wing, American Health Law 927 (1990).

63. Section 6506 of P.L. 101-239, codified at 42 U.S.C. § 701 note.

64. Section 2509 of P.L. 101-239, codified at 42 U.S.C. § 701 note.

65. *See* Pear, *supra* note 42, at A1.

66. *Id.*

67. 886 F.2d 871 (7th Cir. 1989) (en banc).

68. *See, e.g.*, 886 F.2d at 878 (citing General Motors, Dow Chemicals, Ford Motor Company, and Owens-Corning as corporations with fetal protection policies); *Hayes v. Shelby Memorial Hospital*, 726 F.2d 1543 (11th Cir. 1984) (upholding hospital's fetal protection policy); *Wright v. Olin Corp.*, 6997 F.2d 1172 (4th Cir. 1882) (articulating Title VII standard which must be met and suggesting that Olin's policy did not comply).

69. *EEOC Policy Guidance on Reproductive and Fetal Hazards, reprinted in* Fair Empl. Prac. Manual (BNA) (Oct. 3, 1988).

70. *See Johnson Controls*, 886 F.2d at 818.

71. *EEOC Policy Guidance on Seventh Circuit Decision in United Auto Workers v. Johnson Controls, reprinted in* Daily Labor Reporter System, (BNA) Jan. 26, 1990, at D1; brief amici curiae for the United States and the Equal Employment Opportunity Commission in *International Union, UAW v. Johnson Controls*, No. 89-1215 [hereinafter cited brief of U.S. and EEOC].

72. *See* brief of U.S. and EEOC, *supra* note 71, at 20-23 and note 26.

73. Office of Technology Assessment, *Reproductive Hazards in the Workplace* 3 (1985).

74. For example, it is known that family members of asbestos workers have been exposed to large amounts of asbestos which the worker brings home on his or her clothes and hair. *See* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals under Title VII*, 69 Geo. L.J. 641, 657 (1981). Also, there is some speculation that a high-lead level in semen may pose a risk to a developing fetus through sexual intercourse with the mother as well as cause sperm abnormalities which may be linked to genetic defects. See Stellman, *The Occupational Environment and Reproductive Health*, in Environmental and Occupational Medicine 77, 80 (1983).

75. Bush vetoed H.R. 2990 on October 23, 1989.

76. The regulations provide in pertinent part:

(a) (1) A Title X project may not provide counseling concerning the use of abortion as a method of family planning.

(2) Because Title X funds are intended only for family planning, once a client served by a Title X project is diagnosed as pregnant, she must be referred for appropriate prenatal and/or social services by furnishing a list of available providers that promote the welfare of mother and unborn child. She must also be provided with information necessary to protect the health of mother and unborn child until such time as the referral appointment is kept. In cases in which emergency care is required, however, the Title X project shall be required only to refer the client immediately to an appropriate provider of emergency medical services.

(3) A Title X project may not use prenatal, social service or emergency medical or other referrals as an indirect means of encouraging or promoting abortion as a method of family planning, such as by weighing the list of referrals in favor of health care providers which perform abortions, by including on the list of referral providers health care providers whose principle business is the provision of abortions, or by "steering" clients to providers who offer abortion as a method of family planning.

(4) Nothing in this subpart shall be construed as prohibiting the provision of information to a project client which is medically necessary to assess the risks and benefits of different methods of contraception in the course of selecting a method; *provided*, that the provision of this information does not include counseling with respect to or otherwise promote abortion as a method of family planning.

The parties challenging these regulations argue that they are beyond the scope of Title X, a violation of the First Amendment right to free speech, a violation of a woman's Fifth Amendment liberty interest in choosing whether or not to have an abortion, and an interference with the ethically and legally mandated doctor-patient dialogue.

77. *See* American Health Law, *supra* note 62, at 976.

78. Hearing before the Subcommittee on Housing and Consumer Interests (Jul. 24, 1990) (Testimony of Mark V. Nadel, Assoc. Dir. Nat. and Pub. Health Issues Hum. Res. Div., GAO).

79. *Id.*

80. Before the Subcommittee on Housing and Consumer Interests Hearings (Jul. 24, 1990) (Testimony of Anne Wentz, Society for the Advancement of Women's Health Research).

81. P.L. 101-354,codified at 42 U.S.C § 201 note.

82. *See* Wilson, *Caring for Children When Parents Can't*, Nat. Jour., Dec. 16, 1989, at 3070.

83. H.R. 770 (1990).

84. H.R. 3 (1990).

85. Hearings before the Subcommittee on Housing and Consumer Interests, (July 24, 1990) (Testimony of Kathy Brenneman, Chair, Sec. of Geriatrics, Wash. Hosp. Center.)

86. National Center for Health Statistics, 1985 National Nursing Home Survey 23 (1989).

87. American Health Law, *supra* note 62, at 368.

88. H.R. 3933 and S. 1942.

89. *HHS Appropriations*, 28 Health Legislation 1 (1990).

90. *See, e.g.*, Pear, *supra* note 42, at A1; *Closing the Gap: Health and Minorities*, at 1.

Chapter XII

1. *See* R. Burgdorf, "Discrimination Against Handicapped People," in *Accomodating the Spectrum of Individual Abilities* (Sept. 1983).

2. *Ray v. School District of DeSoto County*, 666 F.Supp. 1524 (M.D.Fla. 1987); *Thomas v. Atascadero Unified School District*, 662 F.Supp. 376 (C.D.Cal. 1986)

3. *See, e.g.*, *Chalk v. United States District Court*, 840 F.2d 701 (9th Cir. 1988).

4. *See Doe v. Centinela Hospital*, No. CV-87-2514-PAR (C.D.Cal. 1988) (challenging exclusion of HIV-infected individual from alcohol and drug rehabilitation program; *Dallas Gay Alliance v. Dallas County Hospital District*, Civil Action No. CA3-88-1394-H), N.D.Tex. (challenging hospital policies providing inadequate medical care for people with AIDS).

5. *See Local 1812, AFGE v. Department of State*, 662 F.Supp. 50 (D.D.C. 1987).

6. *School Board of Nassau County v. Arline*, 480 U.S. 273 (1987).

7. 107 S.Ct. 1123, 1128 (1987).

8. 465 U.S. 555 (1984)

9. Like Title VII, therefore, the employment title of the ADA will ultimately cover all employers with fifteen or more employees. However, the ADA also includes a significant phase-in period. In July 1992, the employment title becomes effective for employers with twenty-five or more employees. Two years later, in July 1994, the employment title becomes effective for employers with fifteen or more employees.

10. Section 804(f)(1)-(2) of Fair Housing Act of 1968, as amended.

11. *See* P.L. 101-381, the Ryan White Comprehensive AIDS Resources Emergency Act of 1990, §2661.

Chapter XIII

1. U.S. Department of Housing and Urban Development, *The State of Fair Housing: Report to Congress Pursuant to Section 808(e) (2) of the Fair Housing Act* (1989) at i, iv [hereinafter cited as "HUD, *The State of Fair Housing*"].

2. Schwemm, *Federal Fair Housing Enforcement: A Critique of the Reagan Administration's Record and Recommendations for the Future, One Nation, Indivisible: The Civil Rights Challenge for the 1990s* (1989) [hereinafter cited as "Schwemm, *Federal Fair Housing Enforcement*"].

3. Schwemm, *Federal Fair Housing Enforcement, supra* note 2, at 300-03.

4. 42 U.S.C. §§ 3610(a) (1) (B) (iv), 3610 (g).

5. 42 U.S.C. §§ 3610(g) (2) (A); 3612(a), (b).

6. 42 U.S.C. § 3612 (g).

7. 42 U.S.C. § 3612(g)(2), (3).

8. 42 U.S.C. § 3612(g) (3).

9. 42 U.S.C. § 3612(g)(3).

10. 42 U.S.C. § 3610(e).

11. 42 U.S.C. § 3610(a)(1)(A)(i).

12. 42 U.S.C. § 3601 note.

13. 42 U.S.C. § 3608(e)(2).

14. *See* Schwemm, *Federal Fair Housing Enforcement, supra* note 2, at 290-91.

15. *See* Testimony of John J. Knapp, General Counsel, U.S. Department of Housing and Urban Development, in *Issues in Housing Discrimination*, Vol. 2, at 107 (U.S. Commission on Civil Rights, Nov. 13, 1987); H. R. Rep. No. 711, 100th Cong., 2d Sess. 15 (1988).

16. HUD, *The State of Fair Housing, supra* note 1, at 13.

17. 42 U.S.C. §3610(f).

18. HUD, *The State of Fair Housing, supra* note 1, at 13-15.

19. *Id.* Some of these complaints involved more than one asserted ground of discrimination. The 70% figure includes any complaint where familial status or handicapped condition constituted at least one of the claims.

20. *Id.* The monthly totals for filings at state and local agencies during the 1988-1989 period support the conclusion that the increase in filings is due primarily to the influx of familial status and handicap claims. As noted above, state and local substantial equivalent agencies do not have jurisdiction over familial status and handicap claims. In contrast to HUD filings, monthly averages for filings at state and local agencies remained roughly constant (264 per month in 1988, 269 per month in 1989).

21. *See, e.g.*, Marans, *Measuring Restrictive Rental Practices Affecting Families with Children: A National Survey*, U.S. Department of Housing and Urban Development (1980).

22. *See* Schwemm, *Federal Fair Housing Enforcement, supra* note 2, at 290.

23. *See Fair Housing Complaints Inundate HUD*, Wash. Post, Oct. 14, 1989, at E2.

24. *Id.*

25. HUD, *The State of Fair Housing*, *supra* note 1, at 16.

26. *Id.*

27. 42 U.S.C. § 3610(b).

28. Schwemm, *Federal Fair Housing Enforcement*, *supra* note 2, at 293-94.

29. HUD, *The State of Fair Housing*, *supra* note 2, at 17.

30. *See, e.g.*, *Westside Fair Housing Council v. Westchester Investment Co.*, No. C682413 (Calif. Sup. Ct. Feb. 16, 1990) (consent decree requiring defendants to pay $450,000); *Spann v. Potomac Investment Associates*, C.A. No. 87-1154 (D.D.C. Sept. 7, 1989) (consent order requiring defendants to pay $325,000); *Willis v. H & M Enterprises*, C.A. No. 87-2623 (D.D.C. Sept. 23, 1987) (settlement requiring defendants to pay $325,000); *Fair Housing Congress v. Beaumont Property Management Co.*, C.A. No. C720 w 998 (Calif. Sup. Ct. Dec. 17, 1990) (consent decree requiring defendants to pay $317,000);*Dorsey v. Kay Brothers*, C.A. No. 89-1008 (D. Md. April 6, 1990) (consent order requiring defendants to pay $231,000); *Bradley v. Carydale*, C.A. No. 88-1362-A (E.D. Va. Oct. 6, 1989) (consent order requiring defendants to pay $120,000); *Todd v. Waggaman Brawner*, C.A. No. 87-1059 (D.D.C. May 12, 1988) (consent order requiring defendants to pay $110,000); *Betsey v. Turtle Creek Associates*, 736 F.2d 983 (4th Cir. 1984) (settlement after trial and appeal requiring defendants to pay $125,000); *Robinson v. Harbour Court Associates*, C.A. No. 90-991 (D. Md. Oct. 31, 1990) (consent order requiring defendants to pay $155,000).

31. *See, e.g.*, *HUD v. Blackwell*, P-H Fair Housing-Fair Lending #25,001 (over $60,000 awarded as compensatory damages for humiliation, embarrassment, and emotional distress).

32. *See, e.g.*, *HUD v. Purkett*, No. 09-89-1495-1 (July 31, 1990) ($60,000 settlement in case alleging discrimination on basis of disability).

33. *Schwemm, Federal Fair Housing Enforcement*, *supra* note 2, at 292.

34. 42 U.S.C. 3610(f)(3)(A).

35. As discussed in part II (B)(1) *supra*, HUD's decision to retain jurisdiction over familial status and handicapped claims until states and localities have been certified as substantial equivalents resulted in an enormous increase in its caseload, largely because 70% of the 1989 complaints alleged familial status or handicapped claims. Thus, in its entire docket, HUD retained jurisdiction of 55% of the total complaints received. In 1988 it retained jurisdiction of only 28% of the total complaints received in 1989. *See* HUD, *The State of Fair Housing*, *supra* note 1, at 13. This increase — even if it does not continue in the coming years — will clearly produce considerable difficulties for HUD if certification is not achieved for a majority of states and localities by 1992.

36. HUD, *State of Fair Housing*, *supra* note 1, at 15.

37. P-H Fair Housing-Fair Lending, Bulletin for November 1, 1990 at 1.

38. P-H Fair Housing-Fair Lending #25,001 (Dec. 21, 1989.)

39. P-H Fair Housing-Fair Lending #25,081 (Sept. 28, 1990).

40. P-H Fair Housing-Fair Lending #25,017 (July 13, 1990).

41. P-H Fair Housing-Fair Lending #25,070 (Sept. 21, 1990).

42. P-H Fair Housing-Fair Lending #25,094 (Nov. 15, 1990).

43. *Murphy*, P-H Fair Housing-Fair Lending at #25,059.

44. The one decision to date in which the Secretary did not prevail is *HUD v. Narlis*, P-H Fair Housing-Fair Lending at #25,061 (Sept. 11, 1990).

45. *See* Schwemm, *Federal Fair Housing Enforcement*, *supra* note 2, at 293-95.

46. 42 U.S.C. § 3601 note.

47. HUD's enforcement obligations with respect to handicapped access are not limited to enforcement of the Fair Housing Act. HUD also has enforcement duties under Section 504 of the Rehabilitation Act of 1973. No attempt has been made to review HUD's performance under Section 504 in this chapter. That subject is discussed fully in subsequent sections of the Citizens' Commission's Report.

48. Schwemm, *Federal Fair Housing Enforcement*, *supra* note 2, at 295.

49. *Id.*

50. 42 U.S.C. §3608(e)(2).

51. 42 U.S.C. §3608(e)(1).

52. 42 U.S.C. §3608(e)(1).

53. HUD, *Annual Report to Congress: Civil Rights Data on HUD Program Applicants and Beneficiaries* (1989).

54. Pub. L. No. 100-242, 101 Stat. 1815 (1988).

55. Schwemm, *Federal Fair Housing Enforcement*, *supra* note 2, at 297.

56. In addition to the $3,000,000 in FHIP testing grants, HUD awarded $300,000 to seven organizations in fiscal year 1989 to conduct fair housing education and outreach work.

57. Schwemm, *Federal Fair Housing Enforcement*, *supra* note 2, at 297-299.

58. *Walker v. HUD*, C.A. No. 3-85-1210-R (N.D. Tex.) (consent decree entered September 24, 1990).

59. 896 F.2d 600 (1st Cir. 1990).

60. *Id.* at 601.

61. 721 F. Supp. 361 (D. Mass. 1989) (appeal pending).

62. *See HUD-NAACP Pact Praised, But Its Impact Questioned*, Boston Globe, Jan. 3, 1991; *Fair Housing Pact Steers Middle Path*, Boston Globe, Jan. 6, 1991.

63. *See* P-H Fair Housing-Fair Lending, Bulletin for March 1, 1990 at 6; P-H Fair Housing-Fair Lending, Bulletin for December 1, 1990 at 20.

64. 42 U.S.C. §3614.

65. 42 U.S.C. §3631.

66. Schwemm, *Federal Fair Housing Enforcement*, *supra* note 2, at 277.

67. HUD, *The State of Fair Housing*, *supra* note 1 at 24; *see also* documents provided by the Department of Justice to author upon request and maintained on file at the Washington Lawyers' Committee for Civil Rights Under Law.

68. *Id.*

69. *Id.*

70. C.A. No. 90-C-759 (E.D. Wis. July 27, 1990).

71. C.A. No. 3:89CV7325 (N.D. Ohio May 24, 1989).

72. 907 F.2d 1447 (4th Cir. 1990).

73. C.A. No. 89-6188-CIV (S.D. Fla. April 4, 1990).

74. *Id.* (Order of April 4, 1990 at 4-10).

75. No. 89-3675 (7th Cir. (currently pending)).

76. C.A. No. 90-58-A (E.D. Va. Sept. 14, 1990).

77. *Id.* (Sept. 26, 1990) (jury verdict); (Oct. 15, 1990) (damages, penalties, and injunction).

78. C.A. No. 89-C-4938 (N.D. Ill. Jan. 16, 1990).

79. C.A. No. 89-1139 (W.D. Pa. Mar. 19, 1990).

80. C.A. No. 90-2165 (E.D. Pa. Mar. 28, 1990). See *infra* note 98 and accompanying text (discussing implications of *Schuylkill Township* for application of disparate impact theory to Title VII).

81. C.A. No. 90C-05248 (W.D. Wis. July 23, 1990).

82. C.A. No. 90-3762 (D.N.J. Sept. 21, 1990).

83. Additional recent Justice Department cases challenging the discriminatory implementation of zoning laws against disabled persons include *United States v. Adelanto, CA*, C.A. No. 90-1544 (D. Calif., Mar. 28, 1990); and *United States v. Township of Haverford*, C.A. 90-7624 (E.D. Pa. March 30, 1990).

84. C.A. No. 89-CV-72372-DT (E.D. Mich. Sept. 17, 1990) (consent order).

85. C.A. No. 89-1122-T (W.D. Okla. Aug. 30, 1989) (consent order).

86. *See supra* note 30 (citing cases).

87. *See United States v. La Fonge Association*, C.A. No. 89-1729 (D.N.J. May 30, 1989) (familial status claim; consent decree requiring defendants to pay $33,000); *United States v. Durham Woods Associates*, C.A. No. 89-2183 (D.N.J. Mar. 5, 1990) (same; consent decree requiring defendants to pay $25,000 in damages and $15,000 as civil penalty); *United States v. United Apartments, Inc.*, C.A. No. 89-C-1225 (E.D. Wisc. Feb. 15, 1990) (same; consent decree requiring defendants to pay $42,000); *United States v. Cenvill Illinois Corp.*, C.A. No. 90-C-0644 (E.D. Ill. Feb. 12, 1990) (same; consent decree requiring defendants to pay total of $76,000 for damages, training, and civil penalties).

88. *See, e.g., United States v. Klinkner*, C.A. No. 4-89-210 (D. Minn. Dec. 19, 1989) (consent decree requiring defendants to pay $23,000); *United States v. Phelps Realty Co., Inc.*, C.A. no. C-1-90-089 (S.O. Ohio Oct. 25, 1990) (consent decree requiring defendants to pay $35,000).

89. *Westside Fair Housing Council v. Westchester Investment Co.*, No. C682413 (Calif. Feb. 16, 1990).

90. *See supra* note 30 (citing cases).

91. C.A. No. 90-C-0644 (E.D. Ill. Feb. 12, 1990) (consent order).

92. C.A. No. 89-1729 (D.N.J. May 30, 1989) (consent decree).

93. C.A. No. 89-2183 (D.N.J. Mar. 5, 1990) (consent decree).

94. *See also United States v. United Apartments, Inc.*, C.A. No. 89-C-1225 (E.D. Wisc. Feb. 15, 1990) (consent decree requiring defendants to pay five payments of $3,900 (totaling $19,600) to private fair housing organization, in addition to $22,500 in damages to families with children victimized by the discriminatory practices).

95. *United States v. Tadesusz Bobak*, C.A. No. 89-C-3232 (N.D. Ill. Apr. 20, 1989); *United States v. Dearborn Street Building Assoc., Ltd.*, C.A. No. 89-C-4837 (N.D. Ill. June 16, 1989); *United States v. Schmidling*, *C.A.* No. 89-C-0762 (E.D. Wisc. June 26, 1989); *United States v. Blackwell*, C.A. No. 1:89-CV-1693-ODE (N.D. Ga. July 28, 1989); *United States v. Keck*, C.A. No. C89-1220P (W.D. Wash. Aug. 15, 1989); *United States v. Moonlight Mobile Home Parks, Inc.*, C.A. No. 3:89-CV-7496 (N.D. Ohio Aug. 25, 1989); *United States v. Dunbar Homes, Inc.*, C.A. No. 89-4129 (D.N.J. Oct. 10, 1989); *United States v. Kenosha Gardens Associates*, C.A. No. 89-C-1546 (E.D. Wisc. Dec. 27, 1989).

96. C.A. No. 89-C-3232 (N.D. Ill. Apr. 20, 1989).

97. *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926 (2d Cir.), *aff'd per curiam*, 109 S. Ct. 276 (1988) (*see* Brief of the United States as *Amicus Curiae*).

98. C.A. No. 90-2165 (E.D. Pa. Mar. 28, 1990). *See supra* note 80 and accompanying text (discussing *Schuylkill Township* case).

99. P-H Fair Housing-Fair Lending Bulletin for November 1, 1990 at 2-3.

100. *See* Schwemm, *Federal Fair Housing Enforcement, supra* note 2, at 282-88.

101. 718 F. Supp. 461 (W.D. Va. 1989).

102. 660 F. Supp. 668 (E.D.N.Y. 1987), *aff'd*, 840 F.2d 1096 (2d Cir.), *cert. denied*, 109 S. Ct. 376 (1988).

103. C.A. No. 87-C-6527 (N.D. Ill. Feb. 22, 1990) (consent decree).

104. HUD, *The State of Fair Housing, supra* note 1, at 26-27.

105. P-H Fair Housing-Fair Lending, Bulletin for July 1, 1990 at 6.

Chapter XIV

1. Citizens' Commission on Civil Rights, One Nation, Indivisible: The Civil Rights Challenge For the 1990s, at 263-67 (1989) [hereinafter cited as *One Nation*].

2. *Id.* at 249-51.

3. *See, e.g.*, Center for Law and Social Justice, *Race and Mortgage Lending in New York City: A Study on Redlining*, (November 1988); Atlanta Journal-Constitution, January 22, 1989, *Blacks Denied S & L Loans Twice as Often as Whites;* Center for Community Change, *New Research Shows S & L's Shun Lower Income and Minority Neighborhoods*, (June 13, 1989); Kentucky Commission on Human Rights, *Black and Desegregated Census Tracts of Fayette County Receive Low Percentage of Home Mortgage Loans, 1987-1988*, Staff Report No. 89-8 (1989); K. Bradbury, K. Case, and C. Dunham, *Geographic Patterns of Mortgage Lending in Boston, 1982-1987*, New England Economic Review, Federal Reserve Bank of Boston (September/October 1989); Citizens Research and Education Network, *Checking Out of Hartford: Bank Priorities vs. Neighborhood Needs*, (1989); Housing Study, National Law Journal, Nov. 26, 1990, at 4.

Data collected by the Office of Thrift Supervision indicate that nationwide from the last half of 1988 to the first half of 1989 the rejection rates for blacks increased significantly more than the rejection rates for whites. Statement of Jerauld C. Kluckman, Office of Thrift Supervision, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing, and Urban Affairs, May 16, 1990.

A recent pilot project supervised by the Center for Community Change to "test" for pre-screening discrimination by lenders found evidence of differential treatment based on race. *See* Testimony of Allen J. Fishbein, Center for Community Change, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Consumer Affairs, May 16, 1990.

4. P.L. No. 101-73, Section 1211, 103 Stat. 1983 (1989) [hereinafter cited as "FIRREA"].

5. *Id.* at §1212.

6. *Id.* at §1220.

7. *United States v. U.S. Health, Inc.*, Civil Action No. 89-0361 (D.D.C. filed Feb. 10, 1989); *United States v. Western Trails, Inc., et al.*, Civil Action No. 4: 89-CV-2235 (N.D. Ohio, filed Nov. 17, 1989). The *U.S. Health* case charged the operator of a chain of health and fitness centers with denying credit to blacks because of their race or offering credit to them under less favorable terms and conditions than offered to whites. The case resulted in a consent decree that, in addition to normal record-keeping and educational requirements, provided for affirmative relief to identified, individual victims of the alleged discriminatory practices. *Western Trails* alleged that a campground recreational facility and its owner violated the ECOA by discriminating against persons in making available membership-purchase financing on the basis of race, color, marital status, and age. The case was resolved by consent decree in 1990.

8. *Briceno v. United Guaranty Residential Insurance Company*, Civil Action No. 3:89-CV-7325 (N.D. Ohio). This private case was the first legal challenge to alleged discriminatory practices in the private mortgage insurance industry. The defendant agreed to settle the case shortly after the United States filed its amicus brief.

9. *One Nation, supra* note 1, at 259.

10. *United States v. Heon d/b/a World Gym* (filed Mar. 22, 1990); *N.A.A.C.P. v. American Family Mutual Insurance Co.*, Civil Action No. 90-C-759 (E.D. Wis.); *United Farm Bureau Insurance Co. v. Metropolitan Human Relations Commission*, Case No. F-89-252 (N.D. Ind.).

11. *See One Nation, supra* note 1, at 259 n. 108.

12. *See One Nation, supra* note 1, at 265-66.

13. *One Nation, supra* note 1, at 259-60.

14. *See One Nation, supra* note 1, at 260.

15. *Discrimination in Home Mortgage Lending: Hearing Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs*, 101st Cong., 1st Sess. 112, 108 (October 24, 1989) (testimony of C. Austin Fitts); Statement of Gordon H. Mansfield, Assistant Secretary for Fair Housing and Equal Opportunity, Department of Housing and Urban Development, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs, May 16, 1990; "HUD Requiring All FHA Lenders to Report on HMDA by March 1 [1991]," Real Estate Finance Today, Sept. 21, 1990, at 7.

16. *See* Testimony of Shanna L. Smith, National Fair Housing Alliance, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing, and Urban Affairs, May 16, 1990.

17. *Id.*

18. Statement of Gordon Mansfield, *supra* note 15; *see One Nation, supra* note 1, at 260.

19. *See* 24 C.F.R. §100.110-100.135.

20. *See One Nation, supra* note 1, at 260, 266. For example, HUD could have adopted or incorporated the fairly strong non-discrimination regulations promulgated a decade ago by the Federal Home Loan Bank Board, now enforced by the Office of Thrift Supervision, or those issued by the National Credit Union Administration. Those regulations remain in effect, but technically apply only to savings associations and credit unions, and not to other classes of mortgage lenders. HUD's adoption of them would have expanded their application to any entity engaged in residential mortgage lending transactions.

21. 24 C.F.R. §100.70(d)(4).

22. *See generally* Dennis, *The Fair Housing Act Amendments of 1988: A New Source of Lender Liability*, 106 Banking L.J. 405 (1989).

23. *See* Testimony of Shanna L. Smith, *supra* note 16.

24. *See* Testimony of Allen J. Fishbein, Center for Community Change, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs, May 16, 1990.

25. *See generally Discrimination in Home Mortgage Lending: Hearing Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs*, 101st Cong., 1st Sess. (October 24, 1989).

26. *See, e.g., One Nation, supra* note 1, at 261-62.

27. The FDIC indicated that it maintains no aggregate mortgage lending data reflecting acceptance and rejection rates, and even the information it requires its member banks to collect on log sheets is unavailable to it in a centralized location or in an aggregate format. Federal Deposit Insurance Corporation, Report on Loan Discrimination Pursuant to §1220, October 12, 1989, B5, at 1,3. The Office of the Comptroller of the Currency admitted having no relevant statistics, and the data it does collect is not readily retrievable. Comptroller of the Currency, Report on Loan Discrimination Pursuant to §1220, October 12, 1989 at 1. The Office of Thrift Supervision pointed out that its data collection system (which is the most comprehensive of all of the financial regulators) does not enable conclusions to be drawn regarding the existence of discrimination. Office of Thrift Supervision, Report on Loan Discrimination Pursuant to §1220, October 9, 1989, at 2. The Federal Reserve Board stated that it did not currently have mortgage loan acceptance or rejection statistics of the type contemplated by §1220 of FIRREA. Federal Reserve Board, Report on Loan Discrimination, at 1.

28. Only the Federal Reserve Board made any mention of the many disturbing HMDA studies that have been performed in recent years.

29. 12 C.F.R. Part 203.

30. The Chairman of the House Banking Committee, Rep. Henry Gonzales, later wrote to the Federal Reserve Board of Governors disagreeing with the restrictive way in which the regulations have been applied.

31. Testimony of Allen J. Fishbein, Center for Community Change, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs, May 16, 1990; Bradford, Housing Finance and Race: A Time to End the Dual Market (May 16, 1990) at 11-12. *See also* Fair Housing-Fair Lending Reporter (P-H), Oct. 1, 1989, at 14-15.

32. *See Community Reinvestment Act: Hearings Before the Senate Committee on Banking, Housing, and Urban Affairs*, 100th Cong., 2d Sess. (March 22-23, 1988); *One Nation, supra* note 1, at 261-62.

33. For example, the Policy Statement calls on community groups to comment on an institution's CRA performance before a protest situation arises, rather than after. In addition, extensions of time for public comment will henceforth be allowed only for good cause, not merely because a commenter wants more time.

34. *One Nation, supra* note 1, at 261, 266-67.

35. Statement of Jerauld C. Kluckman, Director, Compliance Programs, Office of Thrift Supervision, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs, May 16, 1990.

36. *Id.*

These policies include:
- minimum loan amounts
- higher charges on smaller loans
- limited number of branches accepting applications
- loan denials based on the ageor location of theproperty
- discounting appraisals (i.e., making double deductions) for reasons already considered by the appraiser
- high downpayment/closing cost requirements
- unrealistically conservative debt/income ratios

The OTS has told Congress that it directs institutions having such policies to remove them immediately or to take affirmative steps to counter their potential negative impact. *Id.*

37. 12 C.F.R.§571.24.

38. It is unclear whether the proposal contemplates making each institution's executive summary available to the public or whether the executive summary will be disclosed only to

the institution. There is little rationale in the latter, since all of the data contained in the summary is publicly available anyway. It is also not clear how this will substantially improve enforcement efforts, since no indication has been given as to how the regulators intend to use the executive summaries.

39. The purpose of a mortgage review board is to review complaints of mortgage loan applicants who believe they have been turned down for a mortgage loan unfairly. Such boards generally do not have any legal enforcement powers, but are viewed as vehicles for voluntarily resolving disputes between consumers and lenders. The boards are typically comprised of consumer, community, and industry representatives. Only a handful of such boards have been set up throughout the country.

40. Testimony of John F. Bovenzi, Deputy to the Chairman, Federal Deposit Insurance Corporation, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs, May 16, 1990.

41. *See* Testimony of Allen J. Fishbein, Center for Community Change, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Consumer Affairs, May 16, 1990. The increased use of testing was recommended by the Citizens' Commission in its initial report. *One Nation, supra* note 1, at 267. It has been recognized by the Federal Reserve Board's Consumer Advisory Council and by a fair lending specialist formerly with the Comptroller of the Currency as the most accurate method of measuring discriminatory treatment by lenders. *See* Fair Housing-Fair Lending Reporter (P-H), Aug. 1, 1990, at 5, 10-11.

The refusal of the agencies to engage in testing is difficult to comprehend. The FDIC does not want to become involved in pre-application testing, for example, because the institution being investigated might not trust it any more. Testimony of John F. Bovenzi, Deputy to the Chairman, Federal Deposit Insurance Corporation, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing and Urban Affairs, May 16, 1990. There is no reason, however, why the FDIC or any other agency cannot out-source the testing so that it can be performed by independent professionals, such as private fair housing groups, who have utilized this procedure for the past 20 years.

42. As a former Special Assistant for Civil Rights to the Comptroller of the Currency has observed, for years agency examiners "have been trained and retrained, given additional tools to assist them in finding discrimination, and encouraged to seek careers in consumer law enforcement. [Yet] none of these efforts have achieved the much sought after goal of establishing an effective enforcement program within the financial regulatory agencies." Testimony of Michelle White, Western Center on Law and Poverty, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee on Banking, Housing, and Urban Affairs (May 16, 1990).

43. 55 Fed. Reg. 18,163 (new regulations issued by the FFIEC regarding the public disclosure of CRA performance evaluations).

44. *See One Nation, supra* note 1, at 266-67.

45. For example, other than "enhancing" its training programs for examiners to ensure better understanding of the requirements of the fair lending and community reinvestment laws, the Office of the Comptroller of the Currency has done little on its own to improve its regulatory performance in the area of mortgage lending discrimination, and has simply cooperated with the other federal regulatory agencies through the activities of the FFIEC. On May 16, 1990, the Comptroller's Special Assistant for Fair Lending resigned, stating that the OCC had suppressed information on compliance performance by national banks and that the OCC's fair lending policy had regressed over the eight years since he joined the agency. Fair Housing-Fair Lending Reporter (P-H), Aug. 1, 1990, at 3-5.

46. Early results of the new examination procedures and criteria are not too encouraging. The agencies were in the past criticized for the high approval ratings given to lending institutions in the examination process. *See One Nation supra* note 1 at 261 & nn. 142-146. The Federal Reserve Board and the FDIC still rate at least 90% of the lending institutions they examine as "outstanding" or "satisfactory" under the new CRA examination guidelines, in seeming contrast to the results of mortgage lending pattern studies. Fair Housing-Fair Lending Reporter (P-H), Dec. 1, 1990, at 7-9; Fair Housing-Fair Lending Reporter (P-H), Jan. 1, 1991, at 5-6.

47. *See* Testimony of Shanna L. Smith, National Fair Housing Alliance, Before the Subcommittee on Consumer and Regulatory Affairs of the Senate Committee and Banking, Housing, and Urban Affairs, May 16, 1990.

Chapter XV

1. In this paper, the term affirmative action means "race-based measures," or "racial classifications," that are designed to confer benefits on racial minorities. *See* Kennedy, *Persuasion and Distrust: A Comment on Affirmative Alternative Action*, 99 Harv. L. Rev. 1327, 1327 n.1 (1986) ("affirmative action refers to policies that provide preferences based explicitly on membership in a designated group").

2. *See* W. Wilson, *The Truly Disadvantaged: The Inner City, the Underclass and Public Policy* (1989); Committee on

the status of Black Americans, *A Common Destiny: Blacks in American Society* (1989).

3. S. Steele, *The Content of Our Character* (1990).

4. *See New York Times*, Jan. 22, A22, Col. 1.

5. *See* Sullivan, *City of Richmond v. J.A. Croson Co.: The Backlash Against Affirmative Action*, 64 Tulane L. Rev. 1609, 1609 (1990) ("societal backlash has set in against affirmative action [and] the *Croson* decision suggests that the backlash has touched the Supreme Court"); *see also* Spann, *Pure Politics*, 88 Mich. L. Rev. 1971, 1973 (1990) (Supreme Court "has responded to a conservative shift in majoritarian attitudes about race discrimination by subtly incorporating contemporary attitudes" into its opinions).

6. *See* Ross, *The Richmond Narratives*, 68 Tex. L. Rev. 381 (1989) (language in *Croson* reflects hostility to affirmative action); Rosenfeld, *Decoding Richmond*, 87 Mich. L. Rev. 1729, 1731 (1989) (*Croson* signals "clear change in direction").

7. The paper does not address questions of damages and immunity for governments and government officials found in violation of applicable affirmative action ground rules.

8. The Supreme Court treated Croson's law suit as a facial challenge to the Richmond ordinance, not as an "as applied" challenge to the City's denial of a waiver.

9. *See Devine, Affirmative Action After Reagan*, 68 Tex. L. Rev. 353, 354-58 (1989).

10. That price must not exceed 75% of the fair market value of the license.

11. The FCC also adopted a third minority preference policy — granting tax certificates to owners who sell their licenses to minority businesses — that was not at issue in *Metro*.

12. *See* Statement of Policy on Minority Ownership of Broadcasting Facilities, 68 F.C.C. 2d. 979 (1978).

13. *Metro*, 110 S. Ct. at 3010 (quoting *Associated Press v. United States*, 326 U.S. 1, 20 (1945)). *See, e.g., FCC v. League of Women Voters of California*, 468 U.S. 364 (1984); *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367 (1969).

14. *See TV9, Inc. v. FCC*, 495 F.2d 929 (D.C. Cir. 1973), *cert. denied*, 419 U.S. 986.

15. *See* Pub. L. 100-202, 101 Stat. 1329-31; Pub. L. 100-459, 102 Stat. 2216; Pub. L. 101-162, 103 Stat. 1020.

16. *See University of California Regents v. Bakke*, 438 U.S. 265, 291-305 (opinion of Powell, J.) (1978); *Wygant v. Jackson Board of Education*, 476 U.S. 267, 281 & n.8 (1986) (plurality opinion).

17. *See, e.g.*, A. Bickel, *The Morality of Consent*, 133 (1975); *Abram, Fair Shakers and Social Engineers*, 99 Harv. L. Rev. 1312, 1318 (1986); Fried, Metro Broadcasting, Inc. v. FCC, *Two Concepts of Equality*, 104 Harv. L. Rev. 107, 109-110 & n.15 (1990).

18. *Croson*, 109 S. Ct. at 753 (*quoting San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973)).

19. The Richmond Plan involved only racial classifications; it did not give preferences in public contracting to women. Thus, *Croson* did not treat the constitutionality of "benign" gender classifications. Therefore, it is uncertain whether the rules delineating the permissible scope of racial classifications designed to benefit minorities established in *Croson* apply to gender classifications that benefit women.

Prior to *Croson*, at least two federal courts had bifurcated their constitutional analyses of affirmative action plans that gave preferences to both minorities and women. *See Michigan Road Builders Association v. Milliken*, 834 F.2d 583, 595 (6th Cir. 1987), *aff'd*, 109 S. Ct. 1333 (1989); *Associated General Contractors v. City and County of San Francisco*, 813 F.2d 913, 928 (9th Cir. 1987). The court in *Associated General Contractors* said that since gender classifications are not as "equally suspect" as racial classifications, they should receive a lower standard of review. 813 F.2d at 928. Therefore, the court employed the "mid-level" review, *id*, at 939, or intermediate scrutiny, that the Supreme Court has traditionally applied to gender classifications that disadvantage women. Under intermediate scrutiny, gender classifications "must serve important governmental objectives and must be substantially related to achievement of those objectives." *Craig v. Boren*, 429 U.S. 190, 197 (1976). The *Associated General Contractors* court was surely correct that this is the standard that should apply in "reverse" gender discrimination suits brought by males. Recently, however, the Sixth Circuit appeared to review an affirmative action program for women under strict scrutiny, and cited *Croson* for support. *See Conlin v. Blanchard*, 890 F.2d 811 (6th Cir. 1989); *see also Milwaukee County Pavers Assoc. v. Fielder*, No. 90-1747 (7th Cir. Jan. 15, 1991) (Supreme Court cases involving gender classifications that discriminate against men did not "insist that the law be shown to be remedial within the meaning of *Croson*. But of course those decisions predate *Croson*. What vitality they retain is an issue we shall leave to a case in which the issue is preserved for appeal.") However, the weight of post-*Croson* authority indicates that intermediate scrutiny is the proper standard of review for such programs, and that the Croson rules are inapplicable. *See Clark v. Arizona Interscholastic Ass'n.*, 886 F.2d 1191, 1193 (9th Cir. 1989); *Harrison and Burrowes Bridge Constructions, Inc. v. Cuomo*, 743 F. Supp. 977, 992-93 (N.D. N.Y. 1990); *Main Line Paving Co. v. Philadelphia Board of Educ.*, 725 F. Supp. 1349, 1362-64 (E.D. Pa. 1989).

20. *See* Gunther, *Supreme Court 1971 Term: Forward — In Search of Evolving Doctrine on a Changing Court: A Model for New Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

21. *See* 109 S. Ct. at 735-39 (Scalia, J., concurring).

22. *See Associated General Contractors v. City and County of San Francisco*, 748 F. Supp. 1443 (N.D. Cal. 1990); *Coral*

Construction Co. v. King County, 729 F. Supp. 734 (W.D. Wa. 1989).

23. *Sullivan,* 64 Tulane L. Rev. at 1615, n. 37.

24. *See, e.g., Long v. City of Saginaw,* 911 F.2d 1192 (6th Cir. 1990); *Cunico v. Pueblo School District,* No. 88-2727 (10th Cir. Oct. 19, 1990); *Contractors Assoc. v. City of Philadelphia,* 735 F. Supp. 1274 (E.D. Pa. 1990); *Main Line Paving Co. v. Philadelphia Board of Education,* 725 F. Supp. 1349 (E.D. Pa. 1989); *Krupa v. New Castle County,* 732 F.Supp. 497 (D. Del. 1990); *Miami Tele-Communications, Inc. v. City of Miami,* 743 F. Supp 1573 (S.D. Fla. 1990); *Harrison and Burrowes Bridge Constructors,* 743 F. Supp. at 1001; *see also Capeletti Bros. v. Metropolitan Dade County,* 735 F. Supp. 1040, 1044 n.3 (S.D. Fla. 1990) ("each of the three factors" supporting affirmative action plan "are now undermined" by *Croson* . . . . Unless there is other evidence upon which this Court could find identified discrimination, the Court would be constrained to declare the county's race-conscious program unconstitutional.").

25. *See, e.g., Associated Builders and Contractors of Louisiana,* 919 F.2d 374 (5th Cir. 1990) (school board declared moratorium on race-conscious contracting program within weeks after Croson decision was handed down).

26. *See New York Times,* July 16, 1990, A1, Col. 1.

27. That Congress had done something was critical, because by itself, FCC determinations that race-conscious action was warranted would probably not be entitled to deference, and the Court might well have applied strict scrutiny. *See S.J. Groves & Sons Co. v. Fulton County,* 920 F.2d 752 (11th Cir. 1991) (absent congressional mandate to do so, federal agency's use of race-conscious measures in allocating contracts might not have withstood challenge).

28. *See* Pub. L. 97-259, 96 Stat. 104 (discussed in *Metro* at 110 S. Ct., 3014-15). The lottery statute was not at issue in the case.

29. That dissent was joined by Chief Justice Rehnquist and Justices Scalia and Kennedy. Justice Kennedy wrote his own dissent as well, which Justice Scalia also joined.

30. *Fried,* 104 Harv. L. Rev. at 115 (1990).

31. The lower court had read Justice Powell's opinion in *Wygant* to impose such a limitation.

32. *See* Sullivan, 64 Tulane L. Rev. at 1613.

33. In *Wygant,* the plurality suggested that state and local governments could enact racial classifications when they had "sufficient evidence to justify the conclusion that there has been prior discrimination," 476 U.S. at 277 (plurality opinion), while Justice O'Connor said a public actor need only have a "firm basis for believing that remedial action was required." *Id.* at 286 (O'Connor, J., concurring).

34. As a preliminary matter, Croson leaves it somewhat unclear *when* a state or local government must have determined that it had satisfied the prima facie test. Justice O'Connor does say that "states and their subdivisions . . . must identify [past] discrimination with some specificity *before* they may use race-conscious relief." 109 S. Ct. at 727 (emphasis added). Nevertheless, it does not appear that the Court intends that a city that, for example, in 1985 had before it all of the evidence necessary to make the findings but did not do so because it concluded that such a predicate was not then required, should have to go through the entire legislative process again. Rather, the purpose behind the specificity requirement appears merely to be to ensure that there is an adequate basis that existed at the time of the enactment, even if no formal findings were made.

35. *See Cone Corp. v. Hillsborough County,* 908 F.2d at 914-159 n.7.

36. The Court tersely noted that "it may well be that Richmond has never had an Aleut or Eskimo citizen." 109 S. Ct. at 728.

37. *See also Coral Construction v. King County,* 729 F. Supp. at 737 (county conducted hearing where "several dozen people gave written or oral descriptions of . . . discrimination").

38. The extent to which a municipality could look back in time in assessing the effects of discrimination today was one of many issues that separated Judges Starr and Mikva in *Hammon v. Barry,* 826 F.2d 73 (D.C. Cir. 1987). Judge Starr focused on current statistical evidence, *id.* at 77, while Judge Mikva analyzed the data in light of discriminatory practices long ago. *Id.* at 92-93.

39. *See* Fried, *Affirmative Action After City of Richmond v. J.A. Croson Co.: A Response to the Scholars' Statement,* 99 Yale L. J. 155, 158 n.26 (1989); cf. *Cunico v. Pueblo District,* No. 88-2727 (10th Cir., Oct. 19, 1990) (citing *Wards Cove* in context of rebuking school district's attempt to use statistics to justify race-conscious employment decisions). *But see* Karst, *Private Discrimination and Public Responsibility: Patterson in Context,* 1989 Sup. Ct. L. Rev. 1, 43 n.147 (arguing that Supreme Court is unlikely to incorporate *Wards Cove* into statistical inquiries in affirmative action cases).

40. *Croson,* 109 S. Ct. at 719 ("'[Richmond] is not just like the federal government with regard to the findings it must make to justify race-conscious remedial action.'") (quoting *Associated General Contractors v. City and County of San Francisco,* 813 F.2d 922, 929 (9th Cir. 1987)).

41. *Shurberg Broadcasting, Inc. v. FCC,* 876 F.2d 902, 914 (D.C. Cir. 1989) (opinion of Judge Silberman) (emphasis in original).

42. *See Fullilove,* 448 U.S. at 473 (opinion of Burger, C.J.) (race-neutral procurement practices were resulting in the "perpetuation of the effects of prior discrimination which had impaired or foreclosed access by minority business to public contracting opportunities"); *Id.* at 520 (Marshall, J., concur-

ring) ("present effects of past racial discrimination" continued to impair access of minority businesses to public contracting opportunities); *see also id.* at 505-06 (Powell, J., concurring).

43. L. Tribe, *American Constitutional Law* 345 (2d. ed. 1988). *See also* Days, *Fullilove*, 96 Yale L.J. 453, 465 (1987).

44. *Croson*, 109 S. Ct. at 727 (emphasis added).

45. *Metro*, 110 S. Ct. at 3008 n. 12.

46. In *Croson*, Justice O'Connor intimated that Congress could authorize, and even require, states and municipalities to institute remedial racial classifications that they could not enact on their own account. *Croson*, 109 S. Ct. at 721 (citing Bohrer, *Bakke, Weber and Fullilove: Benign Discrimination and Congressional Power to Enforce the Fourteenth Amendment*, 56 Ind. L.J. 473, 512-513 (1981)). This is particularly important because there are a number of federal programs in which grants to local governments are conditioned on the establishment of racial preferences at the local level. In fact, the legislation at issue in *Fullilove* — the Public Works Employment Act of 1977 — was an example of such a program. However, the plaintiff in *Fullilove* did not challenge the authority of states and localities to implement the federal set-aside requirement. Rather, the challenge was to Congress' power to adopt the program in the first instance.

Subsequent to *Croson*, several lower courts have held that states do have to make their own independent findings of localized discrimination when they merely implement federal legislation — the Surface Transportation and Uniform Relocation Assistance Act of 1987 — that requires states to give at least 10% of federal highway grants to "disadvantaged business enterprises." (MBE's are presumptively regarded as "disadvantaged" under the Act.) Instead, states could rely on the congressional findings of discrimination underlying that legislation, even if those findings were of the type — the effects of societal discrimination — on which states themselves cannot justify their own affirmative action plans. *See, e.g., Milwaukee County Road Pavers Ass'n. v. Fiedler*, No. 90-1747 (7th Cir. Jan. 15, 1991); *Tennessee Asphalt Co. v. Farris*, No. 85-1176 (M.D. Tenn. June 14, 1990); *Ellis v. Skinner*, No. 87-0616 (D. Utah Oct. 15, 1990); *Harrison and Burrowes Bridge Constructors v. Cuomo*, 743 F. Supp. at 1003-04. In all of these cases, the courts have held that those findings satisfied the *Fullilove* evidentiary standards, particularly given the "extensive testimony and evidence" of discrimination in the national construction industry that was considered before the law was passed. *See* Senate Report No. 100-4, 100th Cong., 1st Sess. (1987), *reprinted in* U.S. Code Cong. and Admin. News Vol. 2, at 76. The Bush Administration—unlike its predecessor—has interpreted the Act as consistent with the *Fullilove* standards.

47. Sullivan, *Sins of Discrimination: Last Term's Affirmative Action Cases*, 100 Harv. L. Rev. 78, 80 (1986).

48. Indeed, for Justice Stevens, there was no "arguable basis for suggesting that the race of a subcontractor or general contractor should have any relevance to his or her access to the market." 109 S. Ct. at 731 (Stevens, J., concurring).

49. *Sable Communications of California v. FCC*, 109 S. Ct. 2829, 2837 (1989).

50. *See Metro*, 110 S. Ct. at 3035-36, (O'Connor, J., dissenting); *see also id.* at 3004 (Kennedy, J., dissenting).

51. *Cf* T. Sowell, *The Economics and Politics of Race* 244 (1983) ("[t]he most obvious fact about the history of racial and ethic preferences is how different they have been — and still are . . .").

52. *See*, generally, Williams, Metro Broadcasting Inc. v. FCC, *Regrouping in Singular Times*, 104 Harv. L. Rev. 525, 537-38 (1990).

53. *See Croson*, 109 S. Ct. at 723. This was seemingly inconsistent with Justice O'Connor's *Wygant* concurrence, where she had apparently accepted the "diversity" rationale for affirmative action in higher education, and had even acknowledged that it might be acceptable in other contexts as well. 476 U.S. at 286 (O'Connor, J., concurring).

54. According to the Administration, the equation changes when race is the sole factor in the scholarship decision.

55. *Metro*, 110 S. Ct. at 3011. *See also FCC v. League of Women Voters of California*, 468 U.S. at 377; *Red Lion Broadcasting Co. v. FCC*, at 390.

56. *See* K. Karst, *Belonging to America: Equal Citizenship and the Constitution* 158-72 (1989) (remedial affirmative action programs "promote the integration of American society, the inclusion of subordinated groups"); Farber, *Richmond and Republicanism*, 41 Fla. L. Rev. 621, 634-36 (1989) ("majority community can persuade minorities that they are welcome in society only by going out of its way to include them in key institutions [which would] help minority group members attain positions of economic security" and promote a feeling of belonging to the larger community).

57. *See United States v. Paradise*, 480 U.S. at 171 (plurality opinion); *Sheet Metal Workers v. EEOC*, 478 U.S. 421, 481 (1986) (plurality opinion); *id.* at 486 (Powell, J., concurring in part and concurring in judgment); *Fullilove v. Klutznick*, 448 U.S. at 510-11 (Powell, J., concurring).

58. *Cf. Fullilove*, 448 U.S. at 510 (Powell, J., concurring).

59. *Wygant*, 476 U.S. at 280 n.6 (plurality opinion).

60. *See Days, Fullilove*, 96 Yale L.J. at 459.

61. *See* Farber, 41 Fla. L. Rev. at 632 (noting Court's "emphasis" in *Croson* on the "process values" of affirmative action); *id* at 637 ("opinion explicitly reveals a deliberative conception of democracy").

62. For Justice Kennedy, however, racial classifications are "a *last resort*," *id.* at 734 (Kennedy, J., concurring) (emphasis added), which implies that, in his view, a government unit should exhaust, not just consider, race-neutral alternatives before going to a race-conscious program.

63. *See Coral Contruction Co. v. King County,* 729 F.Supp. at 739 ("*Croson* does not compel the county to consider every imaginable race-neutral alternative, nor try alternatives that would plainly be ineffective").

64. *See Shurberg,* 876 F.2d at 916-17 n.19 ("[W]hen the government grants preferences to individuals on the basis of 'minority status,' determinations of that status . . . must depend on some notion of individual disadvantage, if not discrimination."); *Winter Park v. FCC,* 873 F.2d. 347, 367-68 (D.C. Cir. 1989) (Williams, J. dissenting) (interpreting *Croson* to mean that racial classifications must contain waivers that ensure benefits are awarded "only to victims of prior discrimination"); *see also Main Line Paving Co. v. Philadelphia Bd. of Educ.* 725 F. Supp. at 1362. *Compare Shurberg,* 876 at 947 (Wald, C.J. dissenting) (FCC preferences should not be "rendered invalid by the fact that participating minority broadcasters are not required to prove that they are individual victims of discrimination"); *Associated General Contractors v. City and County of San Francisco,* 748 F. Supp. at 1455 n. 28 (absence of waiver provision designed to ensure beneficiary of MBE ordinance had suffered from effects of discrimination not "fatal," but would "further strengthen" ordinance with respect to "narrowly tailored" analysis.

65. The only waiver issue in the case *involved* the FCC's efforts to feret out "sham" minority broadcasters. *See* 110 S. Ct. at 3025 n. 48.

66. *Johnson v. Transportation Agency,* 480 U.S. at 638.

67. *See, e.g., Sheet Metal Workers,* 478 U.S. at 481 (Powell, J., concurring).

68. *Wygant,* 476 U.S. at 282-83 (plurality opinion); *see also, id.* at 294 (J. White, concurring) (plan unconstitutional because it "impose[d] the entire burden of achieving racial equality on particular individuals").

69. *See Sheet Metal Workers,* 478 U.S. at 481 (plurality opinion) (hiring goals); *Paradise,* 480 U.S. at 182 (plurality opinion) (promotion goals).

70. *See also Wygant,* 476 U.S. at 319 ("distinction" between layoffs and hiring goals "is artificial") (Stevens, J., dissenting). In fact, the lower court in *Croson* ruled that the Richmond MBE plan "unnecessarily trammeled the rights" of white contractors — even though it did not directly cause layoffs — because "the competitive disadvantage" it imposed was too onerous. *See J.A. Croson Co. v. City of Richmond,* 822 F.2d 1355, 1361 (4th Cir. 1987); *see also Associated General Contractors,* 813 F.2d at 936 (MBE plan unreasonably burdensome because it "may well [have] destroyed" white contracting firms).

71. *Johnson,* 480 U.S. at 636, 641. *See also id.* at 655 (O'Connor, J., concurring in the judgment) (plan flexible because it promoted women on basis of modest short-term goals).

72. *Id.* at 728 (quoting *Sheet Metal Workers,* 478 U.S. at 494 (O'Connor, J., concurring in part and dissenting in part)).

73. *See Mann v. City of Albany,* 883 F.2d 999, 1006 (11th Cir. 1989) (observing that *Croson* raises question whether strict scrutiny applies to court-ordered affirmative action plans).

74. This question of standard of review had not arisen in the school busing cases that pre-dated *Bakke* and the Court's initial consideration of affirmative action. As a theoretical matter, however, it should have come up: The Court was reviewing the constitutionality of judicially-mandated orders that school districts take the race of students into account in complying with desegregation decrees.

75. *See Paradise,* 480 U.S. at 167 (plurality opinion) (district court had "compelling interest . . . in remedying . . . pervasive, systematic and obstinate discriminatory conduct . . . ."); *id.* at 186 (Powell, J., concurring); id. at 196 (O'Connor, J., dissenting); *Sheet Metal Workers,* 478 U.S. at 480-81 (plurality opinion) (district court had detailed evidence of union's discriminatory conduct); *id.* at 485 (Powell, J., concurring) ("findings by the District Court and Court of Appeals that [union] had engaged in egregious violations of Title VII establishes without a doubt, a compelling government interest sufficient to justify the imposition" of affirmative action).

76. *See Paradise* 480 U.S. at 177 ("we conclude that . . . when the district court judge entered his [race-conscious] order, it is doubtful, given the . . . history [of the] litigation, [he] had available to [him] any other effective remedy.") (plurality opinion); *id.* at 188 ("[g]iven the findings of persistent discrimination, the Department's longstanding resistance to necessary remedies, and the exigent circumstances presented to the District Court," the choice of a race-conscious remedy was constitutional) (Powell, J., concurring).

Incidentally, the majority felt that this was also true in *Sheet Metal Workers. See* 478 U.S. at 486 (Powell, J., concurring) ("an alternative remedy such as a simple injunction would not have been effective"); *see also id.* at 481 (plurality opinion).

77. *See also Sheet Metal Workers,* 478 U.S. at 486 (Powell, J., concurring) (district court was in "best position to judge whether an alternative remedy . . . would have been effective").

78. The Second Circuit cited the *Paradise* plurality extensively on this point, and thus gave great deference to a district judge's orders imposing sweeping race-conscious relief in a politically charged case involving a municipality's alleged discrimination. *United States v. Yonkers,* 837 F.2d 1181, 1235-36 (2d Cir. 1987), *cert. denied,* 108 S. Ct. 2821 (1988).

79. Public employers must, of course, abide by both constitutional and statutory restrictions.

80. *See, e.g., Sheet Metal Workers*, 478 U.S. at 477-79, 481 (applying nearly identical considerations to determine whether plan was reasonable under Title VII and narrowly tailored under the Constitution); *see also Ledoux v. District of Columbia*, 820 F.2d 1293, 1301 (D.C. Cir. 1987); *Rutherglen and Ortiz, Affirmative Action Under the Constitution and Title VII: From Confusion to Convergence*, 35 U.C.L.A. L. Rev. 467, 503-04 (1988).

81. *Johnson*, 480 U.S. at 628 (quoting *Steelworkers v. Weber*, 443 U.S. 193, 197 (1979)).

82. Indeed, in *Weber* and *Johnson*, there was no evidence that the employer enacting the plan had itself discriminated.

83. *See Finding a 'Manifest Imbalance': The Case for a Unified Statistical Test for Voluntary Affirmative Action*, 87 Mich. L. Rev. 1986, 1990 (1989).

84. The Court in *Weber* took judicial notice of a history of racial discrimination in craft unions. 443 U.S. at 198 n.1.

85. *See* 480 U.S. at 666 n.4 (Scalia, J., dissenting).

86. At least one commentator has argued that this objective, rather than remedying discrimination, is at the core of most private employers' affirmative action plans. *See* Note, *Rethinking Weber: The Business Response to Affirmative Action*, 102 Harv. L. Rev. 658 (1989).

87. *Johnson*, 480 U.S. at 650-51 (citing *Wygant*, 476 U.S. at 292 (O'Connor, J., concurring)). In *Johnson*, Justice O'Connor applied the prima facie test and found that affirmative action was justified: "When compared to the percentage of women in the qualified work force, the statistical disparity would have been sufficient for a prima facie case brought by unsuccessful women job applicants." 480 U.S. at 656 (O'Connor, J., concurring). As Justice Scalia explained it, the "firm basis" for Justice O'Connor's belief that there was prima facie evidence of sex discrimination lay in the "'inexorable zero': the complete absence of any women in skilled positions." *See id.* at 666 n.4 (Scalia, J., dissenting).

88. *See* Fried, 99 Yale L. J. at 161 & n.48.

89. Justice Souter's views on this question are probably more difficult to predict.

90. Since *Croson*, at least two courts have applied the "manifest imbalance" test to a Title VII challenge to a private employer's affirmative action plan, and did so as if *Croson* had not called *Johnson* and *Weber* into question. *See Cunico v. Pueblo School District*, No. 88-2727 (10th Cir. Oct 19, 1990); *Davis v. City and County of San Francisco*, 890 F.2d 811 (9th Cir. 1989); *see also* Fried, 99 Yale L. J. at 161 & n.48 (arguing for preservation of distinction between Title VII and constitutional limits on affirmative action).

91. *Patterson*, 109 S. Ct. at 2375 (racial harassment covered by Title VII, but not by Section 1981); *see also Johnson v. Railway Express Agency*, 421 U.S. 454 (1975), (different statutes of limitation).

92. *General Building Contractors Ass'n. v. Pennsylvania*, 458 U.S. 375, 391 (1982).

93. *See* Scanlan, *Can Affirmative Action Survive the Struggle?*, *Legal Times*, Jan. 21, 1991, at 23 ("no [Court] precedent impedes a decision that §1981 bars affirmative action in employment (as well as in education and other relationships covered by the statute").

Chapter XVI

1. 42 U.S.C. §§ 1973 *et seq.* For a fuller description of the Act's provisions, see United States Commission on Civil Rights, *The Voting Rights Act: Unfulfilled Goals*, ch. 2, Government Printing Office (1981). Section 2 is national in scope, but the Section 5 preclearance requirement is limited to nine states and parts of seven others with a history of discrimination or which have used English-only elections and have a significant number of non-English-speaking citizens. For an analysis of how the courts have applied these sections, see Laughlin McDonald, *The Quiet Revolution in Minority Voting Rights*, 42 Vand. L. Rev. 1249 (1989).

2. At present, the following states are covered by the Section 5 preclearance requirement: Alabama, Alaska, Arizona, Georgia, Louisiana, Mississippi, South Carolina, Texas, and Virginia, and parts of California (four counties), Florida (five counties), Michigan (parts of two counties), New Hampshire (parts of seven counties), New York (Manhattan, Brooklyn, and the Bronx), North Carolina (40 counties), and South Dakota (two counties).

3. Parker, "Voting Rights' Enforcement in the Reagan Administration," *One Nation, Indivisible*, 362-85 (1989).

4. *Id.* at 365-73.

5. *Id.* at 374-81.

6. *Id.* at 381-82.

7. *Id.* at 384-85.

8. Statement of Assistant Attorney General John R. Dunne before the House Judiciary Subcommittee on Civil and Constitutional Rights Concerning the Civil Rights Division 1991 Authorization Request (May 10, 1990); Address to the Reapportionment Task Force of the National Conference of State Legislatures, "The Voting Rights Act, Redistricting, and the 1990 Census" (June 29, 1990); Address to the Council of State Governments, Eastern Regional Conference, "Reapportionment" (July 31, 1990).

9. *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *cert. granted*, 59 U.S.L.W. 3501 (Jan. 18, 1991) (Nos. 90-813 and 90-974).

10. Dunne became Assistant Attorney General in charge of the Civil Rights Division in April, 1990. In the period

between Reynolds' departure in December, 1988, and before Dunne's arrival, the Division was headed on an interim basis by Acting Assistant Attorney General James P. Turner, a veteran Division administrator. Turner also is responsible for significant improvements in Voting Rights Act enforcement during his 16-month tenure as Acting Assistant Attorney General.

11. Civil No. 1:90-CV-1749-RCF (N.D. Ga. filed Aug 9, 1990).

12. Civil No. CV 88-5435 KN (C.D. Cal. filed Sept. 18, 1988).

13. *See* Frank R. Parker, *Black Votes Count: Political Empowerment in Mississippi After 1965*, at 74 (1990); Laughlin McDonald, *The Majority Vote Requirement: Its Use and Abuse in the South*, 17 Urban Lawyer 429 (1985).

14. *Garza v. County of Los Angeles*, Civil No. 88-5143 (C.D. Cal. June 4, 1990).

15. *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. Nov. 2, 1990), *stay denied*, 59 U.S.L.W. 3420 (Dec. 10, 1990), *cert. denied*, 59 U.S.L.W. 3461 (Jan. 7, 1991) (No. 90-849).

16. The first district court decision striking down at-large judicial elections was the Mississippi case, *Martin v. Allain*, 658 F. Supp. 1183 (S.D. Miss. 1987), in which appeals to the Fifth Circuit were dismissed by agreement of the parties. Subsequently, district courts in Louisiana and Texas also found that at-large judicial elections discriminated against black and Hispanic voters in judicial districts in which majority black and Hispanic single-member districts could be created. Nonetheless, those decisions were vacated or reversed after the Fifth Circuit ruled that Section 2 did not cover at-large judicial elections in *LULAC v. Clements*. *Clark v. Edwards*, 725 F. Supp. 285 (M.D. La. 1988), *vacated*, *LULAC v. Clements*, Civil No. 86-435-A (M.D. La. Oct. 19, 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (Dec. 7, 1990) (No. 90-898); *LULAC v. Texas*, Civil No. B-89-193 (S.D. Tex. 1989), *rev'd*, *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *cert. granted*, 59 U.S.L.W. 3501 (Jan. 18, 1991) (Nos. 90-813 and 90-974).

17. *LULAC v. Texas*, Civil No. B-89-193 (S.D. Tex. 1989).

18. *LULAC v. Clements*, 902 F.2d 293 (5th Cir. 1990).

19. *LULAC v. Clements*, 914 F.2d 620 (5th Cir. 1990) (en banc), *cert. granted*, 59 U.S.L.W. 3501 (Jan. 18, 1991) (Nos. 90-813 and 90-974).

20. *Chisom v. Roemer*, 917 F.2d 187 (5th Cir. 1990), *cert. granted*, 59 U.S.L.W. 3501 (Jan. 18, 1991) (Nos. 90-757 and 90-1032); *Clark v. Roemer*, Civil No. 86-435-A (M.D. La. Oct. 19, 1990), *petition for cert. filed*, 59 U.S.L.W. 3433 (Dec. 7, 1990) (No. 90-898).

21. Petition for a writ of certiorari, p. 8, *United States v. Roemer, cert. granted*, 59 U.S.L.W. 3501 (Jan. 18, 1991) (No. 90-1032).

22. Although the Solicitor General is responsible for Justice Department Supreme Court briefs, the Solicitor General generally consults with the Civil Rights Division in civil rights cases and the Solicitor General's briefs generally reflect Civil Rights Division enforcement policy.

23. *Collins v. City of Norfolk*, 883 F.2d 1232 (4th Cir. 1989), *cert. denied*, 59 U.S.L.W. 3325 (Oct. 29, 1990) (No. 89-989).

24. *Solomon v. Liberty County, Florida*, 899 F.2d 1012 (11th Cir. 1990), *cert. denied*, 59 U.S.L.W. 3460 (Jan. 7, 1991) (No. 90-102).

25. *Jeffers v. Clinton*, 730 F. Supp. 196 (E.D. Ark. 1989) (three-judge court), *aff'd mem.*, 59 U.S.L.W. 3460 (U.S. Jan. 7, 1991) (No. 89-2008).

26. 59 U.S.L.W. 3460 (U.S. Jan. 7, 1991) (No. 89-2008).

27. 875 F.2d 1488 (10th Cir. 1989), *cert. denied*, 59 U.S.L.W. 3325 (Oct. 29, 1990) (No. 89-353).

28. *Thornburg v. Gingles*, 478 U.S. 30 (1986); *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988), *cert. denied*, 109 S. Ct. 3213 (1989); *Citizens for a Better Grenta v. City of Gretna*, 834 F.2d 496 (5th Cir. 1987), *cert. denied*, 109 S. Ct. 3213 (1989).

29. Brief for the United States as Amicus Curiae, pp. 8, 17, *Sanchez v. Bond*, 59 U.S.L.W. 3325 (Oct. 29, 1990) (No. 89-353).

30. 59 U.S.L.W. 3325 (Oct. 29, 1990) (No. 89-353).

31. *See One Nation, Indivisible*, at 370-71.

32. Section 5 objection letter from Assistant Attorney General John R. Dunne to Georgia Attorney General Michael Bowers, April 25, 1990; Section 5 objection letter from Dunne to Louisiana Assistant Attorney General Cynthia Y. Rougeou, September 17, 1990; Section 5 objection letter from Dunne to Texas Special Assistant for Elections Tom Harrison, November 5, 1990.

33. Section 5 objection letter from Dunne to Bowers, April 25, 1990.

34. *Id.* The state is contesting this Section 5 objection in a Section 5 declaratory judgment action in the U.S. District Court for the District of Columbia.

35. Howard Ball, Dale Krane, and Thomas P. Lauth, *Compromised Compliance: Implementation of the 1965 Voting Rights Act*, pp. 137-44 (1982).

36. *Id.* at 142.

37. *E.g.*, *Brooks v. State Board of Elections*, Civil No. CV288-146 (S.D. Ga. Dec. 1, 1989) (three-judge court), *aff'd mem.*, 59 U.S.L.W. 3293 (Oct. 15, 1990) (Nos. 90-272 and 90-332) (new judicial positions); *Clark v. Roemer*, Civil No.

86-435-A (M.D. La. October 22, 1990) (three-judge court), *injunction pending appeal granted,* 59 U.S.L.W. 3361 (U.S. Nov. 2, 1990), *prob. juris. noted,* 59 U.S.L.W. 3501 (Jan. 18, 1991) (No. 90-952) (same).

38. *Clark v. Roemer,* Civil No. 86-435-A (M.D. La. Oct. 22, 1990) (three-judge court), *injunction pending appeal granted,* 59 U.S.L.W. 3360 (U.S. Nov. 2, 1990), *prob. juris. noted,* 59 U.S. L.W. 3501 (Jan. 18, 1991) (No. 90-952); *Hunter v. City of Monroe,* Civil No. 90-2031 (W.D. La. Nov. 7, 1990) (three-judge court), *injunction pending appeal denied,* 59 U.S.L.W. 3391 (U.S. Nov. 26, 1990); *Mexican American Bar Association of Texas v. Texas,* Civil No. MO-90-CA-171 (W.D. Tex. Dec. 26, 1990) (three-judge court).

39. *Clark v. Roemer,* 59 U.S.L.W. 3360 (U.S. Nov. 2, 1990) (No. A-327); *Hunter v. McKeithen,* 59 U.S.L.W. 3391 (U.S. Nov. 26, 1990) (No. A-363).

Chapter XVIII

1. Census questionnaires were to be delivered to 106 million households. Occupants of approximately 88 million households were to receive and to return their forms by mail; about 11 million units would have forms hand-delivered for return by mail; the U.S. Postal Service would deliver unaddressed forms to the remaining households in remote and sparsely populated areas, with the forms to be collected later by census workers. The Bureau projected that 70 percent of the 100 million "mail-back" households would return their forms by mail. Subcommittee on Census and Population, House Committee on Post Office and Civil Service, "Reviewing the Status of Census Operations," H.R. Doc. No. 101-48 (April 19, 1990) [hereinafter cited as "Census Operations Rpt." 101-48] at 9; Turner, The 1990 Census: Guidepost to the 21st Century, The Municipal Yearbook 1990, at 71-72 [hereinafter cited as "The 1990 Census: Guidepost"]; Robey, Two Hundred Years and Counting: The 1990 Census, 44 Population Bulletin at 11-12 (April 1989) [hereinafter cited as "Two Hundred Years and Counting"].

2. Census Operations Rpt. 101-48, *supra* note 1, at 9, 18-19.

3. Census Operations Rpt. 101-48, *supra* note 1, at 7.

4. U.S. Const. art. I, § 2, cl. 3; 13 U.S.C.A. § 141 (West 1990); Citizens' Commission on Civil Rights, *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* (1989), Ch. XX at 352 nn.1-2 [hereinafter cited as "*One Nation, Indivisible*"].

5. *One Nation, Indivisible, supra* note 4, at 352.

6. *See, One Nation, Indivisible, supra* note 4, at 353-54 nn.14-21 (discussing history and severity of the differential undercount). Also among the characteristics of those most likely to be missed and, therefore, undercounted are aliens, homeless persons, persons who do not read and speak English well, persons living in poverty or high-crime areas, transients, and those who share addresses.

7. The Census Bureau had planned to conduct a post-enumeration survey (PES) of 300,000 households to determine the effectiveness of the 1990 census and the need for making statistical adjustments for undercounts and overcounts. Although the Census Bureau had determined that a statistical adjustment was feasible and had informed the Commerce Department in June 1987 that a correction program would be carried out, Commerce Department officials directed in October 1987 that the PES survey be reduced to 150,000 households and be used solely for evaluation and not as a basis for making a correction. *See, One Nation, Indivisible, supra* note 4 at 356 nn.33-39.

8. For a discussion of the Census Bureau's plans, the Commerce Department's actions forbidding a correction program, the legal basis and justifications for a program to correct for the expected undercounts, especially the differential undercount of minorities, and the Citizens' Commission's recommendations, see, *One Nation, Indivisible supra* note 4, at 351-60.

9. *Id.* at 353.

10. Legislation to compel an adjustment was introduced in the U.S. House of Representatives by Rep. Mervyn Dymally of California and was referred to the Subcommittee on Census and Population of the House Post Office and Civil Service Committee (the "Census Subcommittee") in both the 100th and the 101st Congresses. The 100th Congress took no action on H.R. 3511. As of October 1, 1990, no hearings or vote had been scheduled in the 101st Congress on H.R. 526, which had been introduced on January 19, 1989.

On September 27, 1990, however, Subcommittee Chair Thomas C. Sawyer introduced legislation to require that no census data be released until after a determination on the accuracy of the data is complete. *See infra* notes 19-24, 131-32 and accompanying text.

11. *See infra* notes 79-85, 115-122 and accompanying texts.

12. *See infra* note 111 and accompanying text.

13. "Reapportionment" and "redistricting" technically are two distinct terms. The former refers to the process of determining the allocation of seats for a legislative body; the latter refers to the process of drawing lines to determine the geographic boundaries of the jurisdictions the members of the legislature will represent. The terms are used interchangeably in this report, however.

14. Census Subcommittee, "Census Adjustment Lawsuit," Serial No. 101-40 (October 17, 1989) [hereinafter cited as "Census Adjustment Lawsuit Rpt." 101-40] at 104-09 (Table appended to testimony of Daniel Melnick and David Huckabee, Congressional Research Service).

Three states — Louisiana, New Jersey and Virginia — will hold legislative elections and also are required to reapportion in 1991. La. Const. art. III, §§ 6A, 6B; N.J. Const. art. IV, § 3, paras. 1, 2; Va. Const. art. II, § 6. Kentucky and Mississippi also hold elections in 1991, but are not required to complete redistricting until 1993 and 1992, respectively. Ky. Const. § 33; Miss. Const. art. XIII, § 254.

At least 15 other states must reapportion their legislatures by the end of 1991. In Connecticut, Iowa, Oregon and South Dakota, failure of the legislature to meet the deadline triggers removal of the responsibility for reapportionment to another entity (commission, state supreme court or secretary of state). Conn. Const. art. 3, § 6; Iowa Const. art. III, § 35; Or. Const. art. IV, § 6; S.D. Const. art. XIX, § 2.

A proposed constitutional amendment on the November 6, 1990 ballot in Connecticut would extend that state's deadline for congressional and state legislative reapportionment from August 1 to September 15, 1991, and would extend from October 30th to November 30th the deadline for a commission to submit plans to the governor if the legislature fails to act in time. Telephone interview with Alan Green, Director, Office of Legislative Research, State of Connecticut, Sept. 26, 1990.

Other states that are required to reapportion during 1991 are Alabama, Arkansas, Delaware, Illinois, Indiana, Nebraska, Nevada, North Dakota, Ohio, Vermont and Wyoming.

15. *City of New York v. Department of Commerce*, 88 Civ. 3474 (E.D.N.Y. filed Nov. 3, 1988).

16. *Id.* The complaint was later amended to include the city of Houston and Houston residents. In 1990, the state of Texas and the city of Phoenix, Arizona, also joined the lawsuit.

17. *City of New York*, 731 F. Supp. 48 (E.D.N.Y. 1989) order denying motions to dismiss complaint and for summary judgment).

18. *Id.* at 49-52.

19. 88 Civ. 3474 (July 17, 1989) (Stipulation and Order) [hereinafter cited as "Stipulation and Order"].

20. *Id.* Stipulation and Order, *supra* note 19, at 2-3. To aid in the Department's reconsideration of the adjustment decision, the Secretary of Commerce was required to appoint an independent advisory panel by September 30, 1989. The plaintiffs recommended four members of the panel. Stipulation and Order, *supra* note 19, at 4-6.

21. Proposed guidelines were to be published for comment by December 10, 1989. The final guidelines were to be published by March 10, 1990. 88 Civ. 3474, Stipulation and Order, *supra* note 19 at 3.

22. The consent order also called for the Census Bureau to conduct a post-enumeration survey (PES) of at least 150,000 households as part of the 1990 census. The PES survey, which was scheduled to begin July 1, 1990, would have to be conducted in a manner that would assure that the results could be used to produce corrected counts for reapportionment and all other purposes for which census data are published. Stipulation and Order, *Id.*

23. *Id.* at 3-4.

24. *Id* at 4. Congressional apportionment counts are to be reported to the President by December 31, 1990. 13 U.S.C.A. § 141(b) (West 1990). Redistricting counts are to be received by the states by April 1, 1991. 13 U.S.C.A. § 141(c) (West 1990).

Legislation to change the date for reporting counts to the states was introduced in the U.S. House of Representatives on September 27, 1990. *See supra* note 10 and *infra* notes 131-32.

25. Stipulation and Order, *supra* note 19, at 7.

26. *Id.* at 4-6. Appointed as the eight members of the Special Advisory Panel on the 1990 Census were co-chairs Eugene P. Ericksen, professor of sociology at Temple University, and V. Lance Tarrance, Jr., chief executive officer of Tarrance Associates; Leobardo F. Estrada, associate professor of the Graduate School of Architecture and Urban Planning at the University of California at Los Angeles; William Kruskal, the Ernest DeWitt Burton distinguished service professor of statistics of the University of Chicago; J. Michael McGhee, president of McGhee and Associates; John W. Tukey, professor of statistics emeritus and Donner Professor of Science Emeritus from Princeton University; Kenneth W chter, associate professor of demography and statistic at the University of California at Berkeley; and Kirk M. Wolter vice president of the A.C. Nielson Company.

27. The panel would advise the Secretary on the content of the guidelines, the Department's conformance to the guidelines, the pace of the process of determining whether to adjust the census data, and plans and schedules for implementation of the census and the post-enumeration survey to get the most accurate final figures at the earliest practicable time. Each panel member would submit recommendations directly to the Secretary. Stipulation and Order, *supra* note 19 at 4-5.

28. The Department was obligated to provide "the fullest cooperation . . . , including . . . reasonable access to all relevant records and information." Panel members were to receive daily stipends and reimbursement of travel-related expenses. The Department was required to provide the panel with meeting and office facilities and clerical assistance; in addition, it was to make available to the panel a $500,000 fund to be drawn upon by the co-chairs. *Id.* at 5-6.

29. 54 Fed. Reg. 51,002 (Dec. 15, 1989).

30. 55 Fed. Reg. 2,397 (Jan. 24, 1989).

31. Proposed guideline four reads: "The 1990 Census may be adjusted *only if* the adjusted counts are consistent and complete across all jurisdictional levels: national, state and census block. . . ."

Proposed guideline five reads: "The 1990 Census may be adjusted *only if* statistical models of the adjustment process of comparable reliability lead to essentially similar conclusions or if a particular model is shown unequivocally to provide the best estimate."

Proposed guideline six reads: "The 1990 Census may be adjusted *only if* the general rationale for the adjustment can be clearly and simply stated in a way that is understandable to the general public."

Proposed guideline seven reads: "The 1990 Census may be adjusted *only if* the resulting counts are of sufficient quality and level of detail to be usable for Congressional and legislative reapportionment, redistricting, and for all other purposes and at all levels, for which the Census Bureau publishes decennial data."

Proposed guideline eight reads: "The 1990 Census may be adjusted *only if* the adjustment is fair and reasonable, and is not excessively disruptive to the orderly transfer of political representation."

Proposed guideline nine reads: "The 1990 Census may be adjusted even though the differential overcount or undercount compares favorably with the results of the differential overcount and undercount in the 1980 census *only if* there are compelling statistical and policy reasons to do so." 54 Fed. Reg. at 51,003-05 (emphasis added).

32. *Id.* at 51,004.

33. *Id.* (emphasis added) This guideline essentially ignored the very nature of reapportionment and redistricting as processes necessarily requiring disruption in order to comply with constitutional and statutory voting rights under the one-person, one-vote principle and the Voting Rights Act.

34. *Id.* (emphasis added). Proposed guideline nine was also faulty in its over-reliance upon the 1980 census, with its acknowledged problem of severe undercounting, as the standard for measurement of the accuracy of the 1990 census.

35. 54 Fed. Reg. at 51,004.

36. *Id.* at 51,005.

37. Census Subcommittee, "Proposed Guidelines for Statistical Adjustment of the 1990 Census," H.R. Doc. No. 101-43 (January 30, 1990) [hereinafter cited as "Census Guidelines Rpt." 101-43].

38. *Id.* at 19-35.

39. *Id.* at 19-20, 24.

40. July 15, 1991 was the deadline specified in the stipulation and order in the census adjustment lawsuit for a decision by the Department. Stipulation and Order, *supra* note 19, at 4.

41. Census Adjustment Lawsuit Rpt. 101-40, *supra* note 14, at 4-5, 14-15 (testimony of Dr. Mark W. Plant, Deputy Under Secretary of Commerce).

42. Census Guidelines Rpt. 101-43, *supra* note 37, at 46, 49 (testimony of Michael Darby).

43. *Id.* at 49.

44. *One Nation, Indivisible, supra* note 4, at 355 nn.29-30, 356 nn.33-39.

45. Census Guidelines Rpt. 101-43 *supra* note 37, at 229-51 (testimony of Dr. Barbara A. Bailar).

46. *Id.* at 235-37.

47. A correction method that involved a survey and sampling of occupied housing units that previously had been listed as vacant added one million people to the 1970 census count. An imputation program carried out for buildings that could not be verified as either vacant or occupied added 750 million people to the 1980 census; the imputation method was to be used again for the 1990 census. Census Guidelines Rpt. 101-43, *supra* note 37, at 230, 232, 237-38 (testimony of Dr. Bailar); *see also, One Nation, Indivisible, supra* note 4, at 358-59.

48. Census Guidelines Rpt. 101-43, *supra* note 37, at 232, 250 (testimony of Dr. Bailar). For example, the undercount for the dress rehearsal in St. Louis was six percent overall and 12 percent for minorities who were not homeowners. If anything, according to Bailar, all the evidence suggested that the 1990 undercount would be even more severe than in 1980. Contributing factors she cited included the dress rehearsal results, problems with hiring staff, rising functional illiteracy rates, and new immigrants.

49. Census Guidelines Rpt. 101-43, *supra* note 37, at 231-32, 234-35, 245.

50. *Id.* at 233, 249-50, 251-52.

51. *Id.* at 148-69 (testimony of Prof. Eugene P. Ericksen), 177-91 (testimony of Prof. John W. Tukey), 191-214 (testimony of Kirk M. Wolter), 262-73 (testimony of Prof. Joseph B. Kadane).

52. Census Guidelines Rpt. 101-43 *supra* note 37, at 148. Advisory Panel members received a preliminary draft the evening before the first meeting, which the Department had scheduled for October 30-31. The revised guidelines, plus a 70-page statement of technical guidelines, arrived just two days before the second meeting, which was held on November 18.

53. *Id.* at 148-49, 155-56.

54. *Id.* at 157-66.

55. 55 Fed. Reg. 9,838 (Mar. 15, 1990).

56. The final guidelines provided:

Guideline one: The Census shall be considered the most accurate count of the population of the United States, at the national, state, and local level, unless an adjusted count is shown to be more accurate. The criteria for accuracy shall follow accepted statistical practice and shall require the highest level of professional judgment from the Bureau of the Census. No statistical or inferential procedure may be used as a substitute for the Census. Such procedures may only be used as supplements to the Census.

Guideline two: The 1990 Census may be adjusted if the adjusted counts are consistent and complete across all jurisdiction levels: national, state, local, and census block. The resulting counts must be of sufficient quality and level of detail to be usable for Congressional reapportionment and legislative redistricting, and for all other purposes and at all levels for which census counts are published.

Guideline three: The 1990 Census may be adjusted if the estimates generated from the pre-specified procedures that will lead to an adjustment are shown to be more accurate than the census enumeration. In particular, these estimates must be shown to be robust for variations in reasonable alternatives to the production procedures; and to variations in the statistical models used to generate the adjusted figures.

Guideline four: The decision whether or not to adjust the 1990 census should take into account the effects such a decision might have on future census efforts.

Guideline five: Any adjustment of the 1990 Census may not violate the United States Constitution of (sic) Federal statutes.

Guideline six: There will be a determination whether to adjust the 1990 census when sufficient data are available, and when analysis of the data is complete enough to make such a determination. If sufficient data and analysis of the data are not available in time to publish adjusted counts by July 15, 1991, a determination will be made not to adjust the 1990 census.

Guideline seven: The decision whether or not to adjust the 1990 Census shall take into account the potential disruption of the process of the orderly transfer of political representation likely to be caused by either course of action.

Guideline eight: The ability to articulate clearly the basis and implications of the decision whether or not to adjust shall be a factor in the decision. The general rationale for the decision will be clearly stated. The technical documentation lying behind the adjustment decision shall be in keeping with professional standards of the statistical community.

55. Fed. Reg. 9,838, at 9839-42.

57. *See, e.g., supra* note 56, at 9,841 (final guideline four on the effects of a decision whether to adjust might have on future censuses) *supra* note 56, at 9,841 (guideline seven on potential disruption of the transfer of political representation).

58. 55 Fed. Reg. at 9,839.

59. *Id.* at 9,841.

60. *Id.*

61. *See also supra* note 56, at 9,839, final guideline one which starts with the presumption that the census enumeration is the best count, despite its acknowledged history of inaccuracy and significant differential undercounting, and *supra* note 56, at 9,840, final guideline two on the level of detail required for an adjusted count.

62. *City of New York v. Department of Commerce*, 88 Civ. 3474 (E.D.N.Y. motion filed April 11, 1990); U.S. Const. art. 1, Sec. 2, cl. 3; 13 U.S.C.A. Secs. 141, 195 (West 1990).

63. The July 17, 1989 stipulation and order required that the Department reimburse the special advisory panel for certain expenses and provide facilities and staff, as well as making available a special fund for the panel's use. *See supra* notes 20, 26-28. The plaintiffs alleged, and Judge McLaughlin agreed, that the Department had violated the stipulation by charging the costs of stipends, travel reimbursements and office rent to the special fund. 88 Civ. 3474 (E.D.N.Y. June 7, 1990) (memorandum and order at 29-30).

64. *See supra* note 25.

65. 88 Civ. 3474 (E.D.N.Y. June 7, 1990) (memorandum and order).

66. *Id.* at 24, 29.

67. *Id.* at 24-26.

68. 88 Civ. 3474 at 17-19, 27.

69. *City of New York v. Department of Commerce*, 713 F. Supp. at 50 (1989) and cases cited therein; 88 Civ. 3474 (June 7, 1990) at 17-19 and cases cited therein.

70. 88 Civ. 3474 at 19.

71. *Id.* at 27.

72. *Id.* at 26.

73. *Id.* at 27.

74. *Id.* at 27-28.

75. *Id.* at 28.

76. *One Nation, Indivisible, supra* note 4, at 356 n.40.

77. President Bush's first choice to be the Director of the Census Bureau was Alan Heslop, an expert on redistricting issues for the Republican Party in California during the 1980s. After the announcement that he was under consideration drew strong objections from Democrats that such an appointment could lead to the politicization of the historically nonpartisan Bureau, Heslop asked that his name be withdrawn. Eight months after encountering opposition to Heslop, the president appointed Barbara Everitt Bryant, instead, in December, 1989. *See, e.g.*, N.Y. Times, Apr. 19, 1990, at A16, col. 1; Wash. Post, Apr. 26, 1990, at A25, col. 1; Kirschten, *Demographics: Critiquing the Count*, 22 Nat'l J. 1832, 1834 (July 28, 1990).

78. "Two Hundred Years and Counting," *supra* note 1, at 11; "The 1990 Census: Guidepost," *supra* note 1, at 71.

79. N.Y. Times, Apr. 5, 1990, at A18, col. 1; N.Y. Times, Apr. 12, 1990, at A1, col. 6. Among those reported to have been missed in initial mailings were the Clerk of the U.S. House of Representatives, the former staff director of the

House Subcommittee on Census and Population and a congressional auditor responsible for census matters; *see also infra* note 92 and accompanying text.

80. Census Operations Rpt. 101-48 at 9-11.

81. *See, e.g.*, N.Y. Times, Apr. 12, 1990, at A1, col. 6, and A2, col. 1.

82. *Id.* Other cities that reported major problems with missed mailings or the census hotlines included Boston, Orlando, Florida, and Philadelphia.

83. *See supra* notes 1-3.

84. Even in Baltimore, where city officials had decided to pursue an aggressive local outreach program to encourage participation in the census rather than join the adjustment litigation initiated by New York, Los Angeles and other metropolitan areas, the mail-in response rate was only 63% by late April. Kirschten, *Census Politics: Looking for Everybody*, 21 Nat'l J. 779, 782-86 (Apr. 1, 1989); Kirschten, *Demographic Focus: Census Checking*, 22 Nat'l J. 1133, 1192 (May 12, 1990).

By June 6, the combined rate of responses from mail-ins and from door-to-door canvassing of those households that had been missed or that had not returned their forms still lagged for key cities: 74.1% for New York, 82.9% for Los Angeles, 88.6% for Chicago, 89.8% for Houston, 71.7% for Boston, 76% for Washington, DC, 73.4% for Phoenix and 78.8% for Philadelphia. The combined response rate for New Orleans had climbed to 92% and for Detroit, it was 93.4%. Public Information Office, Commerce Department, June 14, 1990.

85. Among the causes attributed to the lower-than-expected response rate were: the "junk mail" appearance of the census mailing; a backlash against the saturation of market surveys, polls and other requests for information, often appearing more official-looking in nature than the census form itself; distrust of government and its uses of information it collects, including the belief that census information would be made available to the Internal Revenue Service; the proximity of Census Day to the April 16th deadline for filing federal tax returns; fears about deportation of illegal aliens (made especially vivid in New York City when raids were carried out by the Immigration and Naturalization Service during the enumeration period); worries about evictions of families illegally sharing households; concerns about privacy; illiteracy and inability to comprehend the forms; and the time involved in filling out the forms, especially the 59-question long form sent to one out of six households. N.Y. Times, Mar. 16, 1990, at A1, col. 2, Apr. 13, 1990, at A1, col. 1, Apr. 26, 1990, at B13, col. 1; Wash. Post, Apr. 18, 1990, at A1, col. 1; USA Today, Apr. 20, 1990, at 1A, col. 4; 22 Nat'l J. 1832, 1835 (July 28, 1990). *See also One Nation, Indivisible, supra* note 4, at 354-55 nn.22-27.

86. For an analysis that contends that the size, mobility and diversity of the U.S. population makes the enumeration techniques used in 1990 antiquated and ineffective, see Gleick, *Why We Can't Count*, N.Y. Times Magazine, July 15, 1990, at 22-26, 54.

87. It also became a much more expensive undertaking. Each percentage point by which the mail-in responses failed to reach the projected 70% level meant that another 950,000 to 1,000,000 households would have to be visited by enumerators; this would add a cost of $10 million per percentage point. Census Operations Rpt. 101-48, *supra* at 13, 17-20, 21-22.

88. Census Operations Rpt. 101-48 at 7-9. Previously planned follow-up activities included canvassing of non-responding housing units, a "Were You Counted?" campaign to be conducted in the summer, and a post-enumeration release of housing counts and preliminary population figures for review by 39,000 governmental units throughout the country. Additional outreach prompted by the lower mail-in response included a national news conference, follow-up regional news conferences, daily national news releases on the response rates, news show appearances, radio actualities and telephone contacts with radio, television and cable media throughout the country, and targeting cities with low returns.

89. Census Operations Rpt. 101-48, at 13, 17-19.

90. Bryant, Written Statement to the House Subcommittee on Census and Population, at 2 (New York City, May 21, 1990) [hereinafter cited as "New York City Census Field Hearings"].

91. New York City Census Field Hearings, *supra* note 90, (written testimony of the American Jewish Congress) at 3-4.

92. *Id.* (written statement of Laura Altschuler, President, League of Women Voters of the City of New York) at 1.

93. *Id.* (written statement of Gumersindo Estevez, Esperanza Center, at 2.

94. *Id.* (written statement of Lillian Fernandez) at 1, 4-5.

95. Census Adjustment Lawsuit Rpt. 101-40 at 5-6, 12-13. A number of homeless activists throughout the country expressed considerable unease about the Bureau's plans to count the homeless. Citing the near-impossibility of achieving an accurate count and their fears that the inaccurate counts would be misused in policy decisions affecting the homeless, some advocates counseled against cooperating with the enumeration. N.Y. Times, Mar. 21, 1990, at A1, col. 2, Mar. 22, 1990, at B12, col. 1; Wash. Post, Mar. 21, 1990, at A1, col. 2.

96. Census Adjustment Lawsuit Rpt. 101-40 at 5-6; Robey, Two Hundred Years and Counting, *supra* note 1, at 13-14; Michael R. Cousineau and Thomas W. Ward, The Los Angeles Homeless Health Care Project, An Evaluation of the 1990 Census of the Homeless in Los Angeles (June 8, 1990) [hereinafter cited as "Los Angeles Homeless Count"].

97. Other homeless people were to be counted during the regular enumeration operations. These included the "hidden homeless" families doubled-or tripled-up in housing units, people occupying tents on commercial campgrounds, and people in jails or other institutions temporarily housing the homeless.

98. N. Y. Times, June 11, 1990, at A17, col. 1. In addition to Los Angeles, the studies contracted by the Census Bureau covered Chicago, New Orleans, New York and Phoenix, Arizona.

99. Los Angeles Homeless Count, *supra* note 96, at 16-17.

100. *Id.* at 4, 16-17. Moreover, enumerators were seen at only 19 of the 39 sites, including 16 of the 30 that had been targeted by the Census Bureau.

101. *Id.* at 17.

102. *Id.* at 13-14 (enumerators' reluctance to leave their cars and search for people; avoidance of dangerous areas; moving too quickly through areas; and having too little time to stop and interview or count people present in some areas).

103. *Id.* at 14-15 (homeless persons' high mobility during the enumeration hours; indifference, fear, reluctance or hostility to enumerators).

104. *Id.* at 15.

105. *Id.* at 15-16.

106. *Id.* at 16.

107. *Id.*

108. *Id.* at 16-17. Preliminary findings from New Orleans indicated that about 1/3 of the homeless population of that city was not counted. Professor James Wright, a sociologist from Tulane University who conducted the study, was quoted as describing the census count as more of an experience of learning about counting the homeless (including the difficulty of reaching people who would not want to be found) than an actual count. N.Y. Times, Mar. 22, 1990, at B12, col. 1, June 11, 1990, at A17, col. 1.

109. N.Y. Times, July 2, 1990, at A10, col. 1.

110. *Id.*

111. *See, e.g.*, N.Y. Times, Sept. 3, 1990, at A1, col. 2, A24, col. 1; 22 Nat'l J. 1832 (July 28, 1990) (quoting Rep. Thomas C. Sawyer, chairman of the Census Subcommittee). *See also* Statement of Rep. Sawyer at Oversight Hearing to Review the Status of 1990 Census Coverage Evaluation Operations, Sept. 11, 1990, at 2-3 [hereinafter cited as "Hearing on Census Coverage Evaluation"].

Professor Eugene Ericksen, one of the co-chairs of the Special Advisory Panel on the 1990 Census, informed the Subcommittee that analysis of the 1980 census had demonstrated clear correlations between low mail-back response rates and differential undercounting. In analyzing the 1990 mail-back response rates, he predicted that the differential undercount would be repeated, and that it could be significantly greater than that for 1980. *See* Written Statement of Professor Eugene P. Ericksen at 4-9.

112. 22 Nat'l J. 1832 (quoting Under Secretary of Commerce Michael R. Darby).

113. *Id.*

114. 21/N.Y. Times, Jul. 29, 1990, Sec. 1 at 25, col. 1.

115. N.Y. Times, Aug. 23, 1990, at A1, col. 1; Aug. 22, 1990, at B1, col. 2. The release of the preliminary figures was part of the Census Bureau's scheduled follow-up plans to have officials representing 39,000 local governmental units screen for errors such as missing housing units. The local housing and population figures were released on a staggered basis from mid- to late-August; localities had fifteen working days between September 10th and 24th to submit challenges to the Bureau. Census Operations Rpt. 101-48 at 8; New York City Census Field Hearings, May 21, 1990 (written testimony of Dr. Bryant) 4, 5-6.

116. N.Y. Times, Aug. 23, 1990, at A1, col. 1.

117. *Id.*

118. N.Y. Times, Sept. 24, 1990, at A1, col. 2.

119. *Id.* The fifteen cities were New York, Los Angeles, Chicago, Houston, Philadelphia, San Diego, Dallas, Phoenix, Detroit, San Antonio, San Jose, California, Indianapolis, Baltimore, San Francisco and Jacksonville, Florida.

120. N.Y. Times, Aug. 31, 1990, at A1, col. 1, B4, col. 3; Sept. 24, 1990, at A1, col. 2; USA Today, Sept. 12, 1990, at 1A, col. 6; Sept. 20, 1990, at 1A, col. 4; Wash. Post, Sept. 24, 1990, at D1, col. 3; Sept. 26, 1990, at A21, col. 1.

121. N.Y. Times, Aug. 31, 1990, at A1, col. 1; Sept. 21, 1990, at B1, col. 2; Sept. 24, 1990, at A1, col. 2; Sept. 26, 1990, at A16, col. 2.

122. N.Y. Times, Aug. 31, 1990, at A1, col. 1, B4, col. 3; Sept. 3, 1990, Sec. 1, at 1, col. 2, 24, col. 1.

123. Bryant, Written Statement to the House Subcommittee on Census and Population at 4, Hearing on Census Coverage Evaluation (Sept. 11, 1990).

124. *Id.* at 10.

123. *Id.* at 4-10.

126. *Id.* at 4-5.

127. *Id.* at 9.

128. *Id.* Professor Ericksen, *supra* notes 26, 111, presented testimony that the evaluation studies being required for the post-enumeration survey were more rigorous than evaluations of other census operations. He also stated that several of the studies either were duplicative of each other or replicated research that had already been done. He expressed concern that the requirement of multiple programs, some of which he said would be likely to increase errors and make interviewing

and matching more difficult, would unnecessarily delay the decision about whether to do a statistical correction of the census data. Hearing on Census Coverage Evaluation (written statement of Dr. Ericksen) at 2-4.

129. Hearing on Census Coverage Evaluation (written statement of Mark W. Plant) at 1-2.

130. *Id.* at 5.

131. The Subcommittee held several oversight hearings on the operations of the census from October, 1989 through September, 1990. These included hearings in Washington, D.C., on October 17, 1989, and January 30, April 19, September 11 and September 25, 1990. In 1990, the Subcommittee also conducted field hearings in New York City (May 21), Austin, Texas (July 2), Philadelphia (July 23), and Annaheim, California (August 8).

132. The bill also would amend Section 195 to codify judicial decisions that statistical sampling techniques may be used in taking the decennial census.

133. 45 C.F.R. Part 1632, 54 Fed. Reg. 10,569 (Mar. 14, 1989).

134. 45 C.F.R. 1632, 55 Fed. Reg. 31,954-59 (Aug. 3, 1989).

135. *Id.*

136. 45 C.F.R. 1632.3, 55 Fed. Reg. at 31,959.

137. 45 C.F.R. 1632.4, 55 Fed. Reg. at 31,959.

138. *Texas Rural Legal Services v. Legal Services Corp.*, C.A. No. 89-3442 (D.D.C. filed Dec. 29, 1989) (complaint, exhibit B: correspondence between the Legal Services Corporation and plaintiffs Texas Rural Legal Aid and North Mississippi Rural Legal Services).

139. *Texas Rural Legal Services*, C.A. No. 89-3442 (D.D.C. filed Dec. 29, 1989). The plaintiffs alleged that in adopting the regulation, the LSC Board had exceeded its authority under the Legal Services Corporation Act; violated specific provisions of the act in its blanket prohibition of legal representation, its restrictions on the use of private funds and its interference with legal services attorneys' professional responsibility to existing clients in requiring their withdrawal from pending cases; violated the first amendment, especially by restricting the programs' use of private funds; and had acted arbitrarily and capriciously, with no rational basis for its actions.

140. C.A. No. 89-3442 (defendants' motion to dismiss or in the alternative for summary judgment; points and authorities in support of motion). The Corporation contended that there was no private right of action under the Legal Services Corporation Act; the Corporation had the authority under the Act to promulgate the rule; and the rule did not violate the First Amendment. As to the effect of the rule's lack of a grandfather clause, the Corporation argued that the plaintiffs had failed to raise the issue in comments during the rulemaking process, and that withdrawal from pending cases did not require legal services attorneys to violate professional ethical rules.

141. C.A. No. 89-3442, slip. op. (D.D.C. June 25, 1990).

142. C.A. No. 89-3442 (defendants' notice of appeal, July 3, 1990).

Chapter XIX

1. Plotkin, Davison, and Kaufman, "Civil Rights Enforcement Policies with Respect to Prisoners' Rights," *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* at 414, 415 (1989) [hereinafter cited as "Prisoners' Rights"].

2. *Id.* at 428-29.

3. N.Y. Times, Sept. 11, 1989, at 18, col. 4.

4. N.Y. Times, Nov. 26, 1989, sec. 4, at 1, col. 1 (California state prisons routinely operate at 175% of capacity); Phil. Inquirer, May 8, 1989, at 1, col. 1 (New Jersey state prisons at 118% of capacity; 42 states under court order to reduce overcrowding).

5. *See Tillery v. Owens*, 1990 U.S. App. LEXIS 10906 (3d Cir. 1990), at *8. Each prisoner had only seven and one half square feet of usuable space; standards established by the American Correctional Association and the American Public Health Association require sixty square feet per inmate. *Id.* at *9.

6. *See* ACLU-NPP Memorandum on H.R. 4079, by A. Aiyetoro & M. Martino, at 4 (on file with authors).

7. The United States Sentencing Commission is an independant agency within the judicial branch composed of seven voting and two non-voting, *ex officio* members. The Commission's task is to establish sentencing policies and practices for the federal criminal justice system. The Sentencing Guidelines, which the Commission promulgates pursuant to 28 U.S.C. § 994, are mandatory and automatically become law unless Congress specifically objects within a 180-day comment period. *See* Federal Sentencing Guidelines Manual (1990 ed.) at 1.

8. Statistics submitted at a Sept. 27, 1989 meeting of the United States Sentencing Commission Advisory Committee by J. Michael Quinlan, Director of the Federal Bureau of Prisons, show that under the Sentencing Guidelines there has been a 200% increase in the number of inmates under the age of 25 relative to the total prison population, while the proportion of inmates with no prior convictions increased by 72% and the proportion of inmates serving sentences of one year or less jumped by 310%. Mr. Quinlan also remarked that the federal prison population was expected to swell from approximately 51,000 inmates in 1989 to over 95,000 in 1995.

9. *See, e.g.*, Report of the Federal Courts Study Committee (April 2, 1990) at 135-36, 141-42 [hereinafter cited as "FCSC Report"]; Memorandum to Members of the ABA Sentencing Guidelines Committee (Sept. 28, 1989), by S. Salky, at 1 (on file with authors).

10. For example, H.R. 4079, 101st Cong., 2d Sess. (1990), the "National Drug and Crime Emergency" Bill, would increase the mandatory minimum sentence for possession of a firearm to ten years without parole, and for use of a firearm to twenty years without parole. Third-time drug felons would be sentenced to life imprisonment without parole. To handle the increase in prison population, the bill would permit prisoners to be housed in tents or other temporary shelters.

11. Morris & Tonry, *Between Prison and Probation—Intermediate Punishments in a Rational Sentencing System*, NIJ Reports 8, Jan./Feb. 1990. One factor that may have hindered the development of such programs in the United States is a fear that they are neither sufficiently punitive nor "tough" enough to deter crime.

12. *Id.*

13. Innovative Boot Camp Prison Act of 1990, S. 2216, 101st Cong., 2d Sess. (1990) and H.R. 4297, 101st Cong., 2d Sess. (1990). *See also* Omnibus Crime Bill, S. 1970, 101st Cong., 1st Sess. (1989) (provides money for boot camp prisons).

14. FCSC Report, *supra* note 9, at 134.

15. *Id.* at 133.

16. *Id.* The Committee found it especially noteworthy that virtually all commentators on the draft proposal supported this recommendation.

17. *Id.* at 135.

18. *Id.* at 139.

19. The majority recommended "immediate study" of the Guidelines and their effects on the administration of justice. The phrase "immediate study," which appears to be synonymous with "prompt inaction," seems consistent with the Bush Administration philosophy of "prudence" and circumspection.

20. *Id.* at 135-36.

21. *Id.* at 141-42. The majority admits this fact at 136.

22. Several courts have held that the Supreme Court's statement in *Bell v. Wolfish*, 441 U.S. 520, 547 (1979), that prison officials "should be accorded wide-ranging deference in the adoption and execution of policies and practices that in their judgment are needed to preserve internal order and discipline and to maintain institutional security" is applicable in the context of prison policies regarding AIDS.

23. *See, e.g.*, *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989); *Harris v. Thigpen*, 727 F. Supp. 1564 (M.D. Ala. 1990).

24. *Dunn*, 880 F.2d 1188; *Harris*, 727 F. Supp. 1564.

25. *See, e.g.*, *Glick v. Henderson*, 855 F.2d 536 (8th Cir. 1988); *Feigley v. Fulcomer*, 720 F. Supp. 475 (M.D. Pa. 1989).

26. *Glick*, 855 F.2d 536; *Feigley*, 720 F. Supp. 475.

27. As of January, 1990 only four states were segregating all inmates who tested positive for the AIDS virus. Fears of rampant AIDS outbreaks in prisons may well have proved exaggerated; since 1985, annual surveys by the National Institute of Justice have shown that AIDS is spreading more slowly in prisons than outside them, and fewer than one percent of the nation's prisoners have developed AIDS. Whitman, "Inside an AIDS Colony," U.S. News & World Report, Jan. 29, 1990, at 22.

28. *See, e.g.*, *Glick*, 855 F.2d 536; *Welch v. Sherriff, Lubbock County, Texas*, 734 F. Supp. 765 (N.D. Tex. 1990); *Deutsch v. Federal Bureau of Prisons*, 1990 U.S. Dist. LEXIS 5025 (S.D.N.Y. 1990); *Hochman v. Rafferty*, 1989 U.S. Dist. LEXIS 16577 (D.N.J. 1989); *Maddox v. Goode*, 1989 U.S. Dist. LEXIS 1904 (E.D. Pa. 1989). *But see Harris*, 727 F. Supp. at 1572 (suggesting that housing inmates with AIDS together with general prison population may violate Eighth Amendment).

29. *See, e.g.*, *Harris*, 727 F. Supp. 1564; *Brickus v. Frame*, 1989 U.S. Dist. LEXIS 8510 (E.D. Pa. 1989).

30. *Brickus*, 1989 U.S. Dist. LEXIS 8510 at *6; *see also* Whitman, "Inside an Aids Colony," *supra* note 27, at 22-23.

31. *See Harris*, 727 F. Supp. 1564; *Rodriguez v. Coughlin*, 1989 U.S. Dist. Lexis 15898 (W.D.N.Y. 1989), and cases cited therein; *see also* Whitman, "Inside an AIDS Colony," *supra* note 27 (describing conditions in segregated AIDS cellblock).

32. *See, e.g.*, *Rodriguez*, 1989 U.S. Dist. LEXIS 15898; *Doe v. Coughlin*, 697 F. Supp. 1234 (N.D.N.Y. 1988); *Woods v. White*, 689 F. Supp. 874 (W.D. Wis. 1988); *see also Doe v. Borough of Barrington*, 729 F. Supp. 376 (D.N.J. 1990) (finding that family members of AIDS victim have right to privacy as to victim's medical history).

33. *Harris*, 727 F. Supp. at 1571-72.

34. *See Rodriguez*, 1989 U.S. Dist. LEXIS 15898 at *8; *Doe v. Coughlin*, 697 F. Supp. at 1238.

35. *See, e.g.*, *Hawley v. Evans*, 716 F. Supp. 601 (N.D. Ga. 1989); Harris, 727 F. Supp. at 1577. Courts have relied on the standard first enunciated in *Estelle v. Gamble*, 429 U.S. 97, 106 (1976): for a plaintiff to prevail on an Eighth Amendment claim based on inadequate medical treatment, he must show that the treatment allegedly withheld constituted "an omission sufficiently harmful to evidence deliberate indifference to serious medical needs."

36. *Hawley*, 716 F. Supp. at 603-04. *See also Harris*, 727 F. Supp. at 1577-78 (noting high cost of experimental treatments and making the dubious suggestion that, were they

offered, AIDS victims might commit crimes in order to take advantage of free treatment in prison).

37. *See Wilson v. Franceschi*, 735 F. Supp. 395, 398 (M.D. Fla. 1990); *Hawley*, 716 F. Supp. at 602-03.

38. *Botero Gomez v. United States*, 725 F. Supp. 526 (S.D. Fla. 1989).

39. 54 Fed. Reg. 49,056 (1989) (to be codified at 28 C.F.R. pt. 549) (proposed Nov. 28, 1989).

40. Prisoners' Rights, *supra* note 1, at 416-17.

41. Under section 1983 of the Civil Rights Act of 1871, a prisoner may bring suit in federal court when a prison official or employee acting pursuant to a regulation or practice ("under color of state law") deprives the prisoner of a right guaranteed by the Constitution or federal law. Only a prisoner seeking relief for deprivation of rights may bring suit under section 1983; a prisoner challenging the length or fact of custody is required to file a writ of habeus corpus. *See, e.g., Preiser v. Rodriguez*, 411 U.S. 475, 499 (1972). The most common types of actions are complaints about prison conditions under the "cruel and unusual" standard of the Eighth Amendment, and civil liberties claims under the First, Fourth, and Fourteenth amendments.

42. *Thornburgh v. Abbot*, 104 L. Ed. 2d 459, 469 (1989) (quoting *Turner v. Safley*, 482 U.S. 78, 85 (1987)).

43. "Prisoners' Rights," *supra* note 1, at 416.

44. 416 U.S. 396 (1974).

45. *Id.* at 405.

46. 482 U.S. 78 (1987). In *Turner*, prisoners challenged a Missouri Division of Corrections' regulation restricting inmate-to-inmate correspondence.

47. *Jones v. North Carolina Prisoners' Union*, 433 U.S. 119 (1977) (ban on inmate solicitation and group meetings rationally related to reasonable objectives of prison administration); *Bell v. Wolfish*, 441 U.S. 520 (1979) (rule restricting receipt of hardback books upheld as rational response to security concern); *Block v. Rutherford*, 468 U.S. 576 (1984) (ban on contact visits upheld based on reasonable security concerns of prison administrators).

48. 482 U.S. at 89. Needless to say, the Court upheld the prohibition on correspondence between inmates at different institutions as "logically connected to . . . legitimate security concerns." *Id.* at 91.

49. 104 L. Ed. 2d 459 (1989).

50. *Id.* at 473. A regulation is reasonable if the claimed government objective is facially "neutral" in that it solely relates to legitimate security concerns, and if the regulation at issue "rationally relates" to those security objectives.

51. *Murray v. Giarratano*, 106 L. Ed. 2d 1 (1989).

52. *Washington v. Harper*, 108 L. Ed. 2d 178 (1990). The court held that while an inmate possesses a significant liberty interest under the Fourteenth Amendment in avoiding the unwanted administration of drugs, that interest, considered "in the context of the inmate's confinement," was outweighed by the state's interest in prison safety and security. *Id.* at 198-99. The Court stated that prison officials, and not judges, are best equipped to make difficult decisions regarding prison administration. *Id.* at 199.

53. For example, in *Solomon v. Zant*, 888 F.2d 1579 (11th Cir. 1989), the Eleventh Circuit reversed a district court's holding that a death row inmate's constitutional rights had been violated when the application of a "no beard" regulation prevented him from consulting with his lawyer. The inmate, Van Roosevelt Solomon, was subsequently executed by the state of Georgia after the filing of his section 1983 claim, and his widow was substituted as plaintiff after his death. Despite evidence that the prison had not denied other inmates access to their lawyers for refusing to shave, and internal procedures which do not permit denial of access to legal counsel as a form of punishment, the court of appeals found that the "no beard" regulation and its application in this case withstood scrutiny under the Turner standard of reasonableness. The "legitimate penological interests" identified were "escape prevention," "personal hygiene," and internal "order and discipline." *Id.* at 1581-82.

In many cases, however, the courts merely state that a "legitimate penological interest" is served without bothering to articulate what that interest is. *See, e.g., Williams v. Carlson*, No. 86-3195 (D. Kan. Jan. 23, 1990) (1990 WESTLAW 10994) (finding the monitoring of correspondance and telephone conversations reasonable); *Turner v. Rawls*, No. 87-3098-S (D. Kan. Jan. 30, 1990) (1990 WESTLAW 10996) (finding screening, interception, and confiscation of inmate's outgoing mail to his mother reasonable). *But see Sorich v. Terry*, No. 86-L-722 (D. Neb. June 29, 1989) (1989 WESTLAW 87386) (policy of refusing to forward prisoners' mail violated prisoners' constitutional rights despite asserted penological goal of "teaching independence"). In *Dunn v. White*, 880 F.2d 1188 (10th Cir. 1989), the Tenth Circuit quoted the *Turner* standard in finding that mandatory blood testing of prisoners to determine exposure to AIDS did not violate the Fourth Amendment. The court also cited *Bell v. Wolfish* for the proposition that preserving internal order, discipline and institutional security are essential goals that may override the constitutional rights of prisoners. *Id.* at 1191. A federal district judge in Alabama has relied on *Turner* in upholding the policy of segregating inmates with AIDS from the general prison population. *Harris*, 727 F. Supp. 1564.

54. *Hardin v. Straub*, 104 L. Ed. 2d 582 (1989).

55. *See, e.g., Morales-Feliciano v. Parole Board of Puerto Rico*, 887 F.2d 1, 5 (1st Cir. 1989), *cert. denied*, 110 S. Ct. 1511 (1990); *Tillery v. Owens*, 719 F. Supp. 1256 (W.D. Pa. 1989), *aff'd*, 1990 U.S. App. LEXIS 10906 (3d Cir. 1990);

see also The National Prison Project, Quarterly Report for the Quarter Ending March 31, 1990 (detailing numerous cases in which courts continue to monitor and address emergency overcrowding conditions subsequent to initial orders and consent decrees).

56. *Ennis v. Coughlin*, 1990 U.S. Dist. LEXIS 7209 (S.D.N.Y. 1990).

57. *Id.* Proving an Eighth Amendment claim can be difficult, as the plaintiff must show that the challenged practice created cruel and unusual conditions when viewed in light of the "totality of the circumstances." A court may well require the totality of the circumstances to indicate that almost every aspect of confinement falls below constitutional minima. *See Tillery*, 719 F. Supp. 1256 (court found overcrowding together with inadequate security, fire protection, plumbing, ventilation, sanitation, and medical, dental, and psychiatric care).

58. *See, e.g., Knight v. Armontraut*, 878 F.2d 1093, 1095-96 (8th Cir. 1989) (keeping inmates in segregation for a longer period of time than allowed by disciplinary rules is not an Eighth Amendment violation when the excess time is due to a lack of beds); *Gillihan v. Shillinger*, 872 F.2d 935, 940 (10th Cir. 1989) (per curiam) (freezing a prisoner's account until transportation expenses are paid does not constitute cruel and unusual punishment); *Bruscino v. Carlson*, 854 F.2d 162 (7th Cir. 1988), *cert. denied*, 109 S. Ct. 3193 (1989) ("permanent lockdown" including around the clock confinement and a prohibition on social and group religious activities is "reasonable" when there is a history of violence at the prison and the character of the inmates is deemed to be incorrigible). *But see Todaro v. Boomer*, 872 F.2d 43, 48 (3d Cir. 1989) (allegation that inmate was held in confinement for 72 hours without a hearing in violation of regulations stated a valid Eighth Amendment claim); *Jackson v. Cain*, 864 F.2d 1235 (5th Cir. 1989) (Eighth Amendment claim is sufficiently stated when there exists a material issue as to whether a prison official knowingly assigned an inmate to a work detail that would aggravate a serious medical condition). *See generally* Project, *Nineteenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1988-1989*, 78 Geo. L.J. 1429-60 (1990).

59. Pub. L. No. 96-247, 94 Stat. 349 (1980) *amended by* Pub. L. No. 97-256 (codified at 42 U.S.C. § 1997 (1982)); *see also* Prisoners' Rights, *supra* note 1, at 418.

60. *Id.* at § 1997a.

61. *See* Prisoners' Rights, *supra* note 1, at 417.

62. *Id.* read in conjunction with 42 U.S.C. § 1997(1)(B)(ii).

63. 42 U.S.C. § 1997e(b)(2). The Attorney General has promulgated more specific "minimum standards" under 28 C.F.R. 40.

64. *See* Prisoners' Rights, *supra* note 1. Out of frustration with the government's inactivity in the ongoing enforcement action arising from *United States v. Michigan*, Judge Enslen of the Western District of Michigan recently issued an order allowing the *amicus curiae* inmates, whose motion to intervene had previously been denied, to prosecute the action as an active party. This change in status was upheld by the Sixth Circuit in *United States v. Michigan*, 901 F.2d 503 (6th Cir. 1990).

65. Telephone interview with Special Litigation staff member, who requested anonymity (June, 1990).

66. Interview with Adjoa Aiyetoro, Director of Legislative and Community Affairs for the ACLU National Prison Project, in Washington, D.C. (June 11, 1990).

67. *See, e.g., Justice Dept., Activists Meet Over Civil Rights Act*, Legal Times, June 11, 1990, at 21.

68. N.Y. Times, Jan. 27, 1990, at 10, col. 4.

69. Interview with Adjoa Aiyetoro, *supra* note 66.

70. *See* Watson, *Endorsements Smooth Path for Dunne*, Legal Times, March 12, 1990, at 6.

71. Wicker, *In the Nation; A Man of Character*, N.Y. Times, Jan. 29, 1990, at A23, col. 6.

72. *Id.*

73. *Newsday*, Feb. 12, 1990, at 13 (interview with John Dunne).

74. Telephone interview with Special Litigation Section staff member, *supra* note 65; interview with Adjoa Aiyetoro, *supra* note 66.

75. Telephone interview with Special Litigation Section staff member, who requested anonymity (January 15, 1991). Ten new investigations recently have been opened by the Section.

76. For example, a search of NEXIS newspaper and magazine databases produced virtually no articles since 1988 on CRIPA and prisoners' rights.

77. *Civil Rights of Institutionalized Persons Act: Hearing Before the Subcomm. on Courts, Civil Liberties, and the Administration of Justice and the Subcomm. on Civil and Constitutional Rights of the House Comm. on the Judiciary*, 98th Cong., 1st & 2nd Sess. 111 (1983-84).

78. Plaintiff United States' Response to Defendants' Motion to Reconsider and Alter the Court's November 3rd and 6th Opinion and Order, *United States v. Michigan*, No. G84-63 (W.D. Mich. Nov. 6, 1989). The order requires the defendants to develop a new prisoner classification plan pursuant to provisions in Consent Decree.

79. *Id.* at 9.

80. *Id.* at 17.

81. Interview with Elizabeth Alexander, Chief Staff Counsel of the ACLU National Prison Project, in Washington, D.C. (June 11, 1990).

82. Interview with Special Litigation staff member, *supra* note 65.

83. *Id.*

84. *See generally Prisoners' Rights, supra* note 1, at 419.

85. *See* Lay, *Exhaustion of Grievance Procedures for State Prisoners Under Section 1997e of the Civil Rights Act*, 71 Iowa L. Rev. 935, 936 (1086).

86. Draft Subcommittee Report of the Federal Courts Study Committee 5-6 (1989) (on file with authors). Iowa, Missouri, Nebraska, Ohio, Tennessee, Virginia, the Wyoming Penitentiary, plus local jails in Maryland and Virginia have had plans certified. *Id.*

87. Lay, *Exhaustion of Grievance Procedures, supra* note 85, at 942-46.

88. *See generally id.* at 949-52; Draft Subcommittee Report, *supra* note 86, at 6-9.

89. Letter to the Office of the Legislative Liaison of the Federal Courts Study Committee (October, 1989) (on file with authors).

90. Oversight responsibility in the House rests with the Subcommittee on Courts, Intellectual Property, and the Administration of Justice, and the Subcommittee on Civil and Constitutional Rights, both of the House Committee on the Judiciary.

91. *See* Prisoners' Rights, *supra* note 1, at 418-19, 421, 427.

92. Interview with House Judiciary Committee staff members, in Washington, D.C. (June 27, 1990).

93. Public letter from the National Prison Project to Judge Richard Posner of the Federal Courts Study Committee (Oct. 18, 1990).

94. For a discussion of the Committee, see *supra* notes 14-21 and accompanying text.

95. FCSC Report, *supra* note 9, at 4.

96. *Id.* at 48. *See supra* notes 59-63 and accompanying text.

97. *See supra* notes 85-89 and accompanying text.

98. This is the opinion, for example, of Professor Judith Resnik, who wrote to Judge Posner about her concerns prior to the drafting of the Committee's final recommendations. Letter from Professor Judith Resnik to Judge Posner (Oct. 25, 1989) (on file with authors.)

99. Public letter from the National Prison Project to the Federal Courts Study Committee (Jan. 30, 1990).

100. *Id.*

101. *See* National Prison Project Status Report, Nov. 30, 1989.

102. *See* NPP Public Letter, *supra* note 99.

103. FCSC Report, *supra* note 9, at 51. *See also* Letter, *supra* note 89.

104. *See* Interview with House Judiciary Committee staff members, *supra* note 92.

Chapter XX

1. Pub. L. No. 101-336, 104 Stat. 327 (1990) (to be codified at 42 U.S.C. Sec. 12101) [hereinafter cited as "ADA"].

2. H.R. Rep. No. 485, 101st Cong., 2d Sess., pt. 3 at 23 (1990) [hereinafter cited as "Judiciary Report"].

3. Pub. L. No. 101-336 at § 102 (b) (5) (A).

4. Pub. L. No. 101-j336 at § 105; 42 U.S.C §§ 2000e-4, 2000e-5, 2000e-6, 2000e-8 and 2000e-9.

5. Pub. L. No. 101-336 at § 101 (2).

6. Pub. L. No. 101-336 at §§ 101(5) and 108.

7. Pub. L. 101-336 at § 201.

8. Pub. L. 101-336, Subpart B.

9. Pub. L. No. 101-336 at § 203.

10. Pub. L. No. 101-336 at § 223.

11. Pub. L. No. 101-336 at § 231.

12. Pub. L. No. 101-336 at § 302(a).

13. Judiciary Report, *supra* note 2, at 54.

14. Pub. L. No. 101-336 at § 301(9).

15. Pub. L. No. 101-336 at §§ 302(b)(2)(A)(ii) and (iii).

16. Pub. L. No. 101-336 at § 306(c)and (d). The Board published a Notice of Proposed Rulemaking in the January 22, 1990 Federal Register.

17. Pub. L. No. 101-336 at § 304.

18. Pub. L. No. 101-336 at § 310.

19. Pub. L. No. 101-336 at § 308.

20. Pub. L. No. 101-336 at § 225(a)(3).

21. Pub. L. No. 101-336 at § 225(c).

22. Pub. L. No. 101-336 at § 225(d).

23. Pub. L. No. 101-336 at §§ 501-514.

24. S. Rep. No. 116, 101st Cong., 1st Sess. at 9,17 (1989)(testimony of Attorney General Thornburgh, on behalf of President Bush) [hereinafter cited as "Senate Report"]. *See also, The Americans With Disabilities Act: A Practical Guide to Impact, Enforcement and Compliance,* (BNA) at 35 (1990). [hereinafter cited as "Americans With Disabilities Act Guide"].

25. Americans With Disabilities Act Guide, *supra* note 24, at 37-38.

26. Americans With Disabilities Act Guide, *supra* note 24, at 37-40.

27. Senate Report, *supra* note 24, at 21.

28. Pub. L. No. 101-336 at § 511; Americans With Disabilities Act Guide, *supra* note 24, at 43.

29. Americans With Disabilities Act Guide, *supra* note 24, at 52-54.

30. Although the amendment passed in the House, it was rejected by the Senate-House Conference Committee and was finally replaced by an amendment introduced by Senator Hatch (R-UT) requiring HHS to publish a list of diseases that could be communicated through food.

31. Americans With Disabilities Act Guide, *supra* note 24, at 46-48.

32. President's Committee on Employment of People with Disabilities, *Worklife*, Fall 1990.

Chapter XXI

1. 29 U.S.C. § 794.

2. Pub. L. No. 100-430, 102 Stat. 1619 (1988), codified at 42 U.S.C. § 3601, *et seq.*

3. 24 C.F.R.§ 8.51.

4. 29 U.S.C.§ 791.

5. 29 U.S.C.§ 794.

6. 42 U.S.C.§ 4151.

7. *One Nation, Indivisible* at 485-86.

8. 12 U.S.C. § 1701q.

9. 12 U.S.C. § 1701q(a)(2)(A).

10. 12 U.S.C. § 1701s.

11. 53 Fed. Reg. 20227 (June 2, 1988).

12. 42 U.S.C.§ 3604(f)(3)(A).

13. 24 C.F.R.§ 8.51.

14. 24 C.F.R.§ .23.

15. *One Nation,Indivisible* at 481-83.

16. Letter from Robert J. DeMonte, HUD Regional Administrator-Regional Housing Commissioner to Al DiLudovico, Executive Director, Housing for Independent People, Inc., October 7, 1988.

17. *Id.*

18. United States District Court, N.D. Cal., No. 3893469 F.M.F.

19. 54 Fed. Reg. 3246 (January 23, 1989).

20. *See, e.g., City of Cleburne v. Cleburne Living Center*, 474 U.S. 432 (1985).

21. *See, Index of Resource Materials on Fair Housing for People with Disabilities*, Mental Health Law Project, Washington, D.C. Nov. 1991.

Chapter XXII

1. This chapter focuses on the rights of persons with mental disabilities, principally people with mental retardation or mental illness.

2. 42 U.S.C. § 1997 *et seq.*

3. Dinerstein, "Rights of Institutionalized Disabled Persons," *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* at 388 (1989) [hereinafter cited as "Rights of Institutionalized Disabled"].

4. *Id.* at 412-13.

5. As yet, there has been no indication that the leadership of the Justice Department or its Civil Rights Division has focused on the problems with CRIPA as written, although there is reason to believe that lawyers in the Division's Special Litigation Section are well aware of at least some of those problems. For example, the 1988 and 1989 Reports of the Attorney General Regarding the Civil Rights of Institutionalized Person Act [hereinafter cited as "FY 1988 CRIPA Report" and "FY 1989 CRIPA Report"], in which the Department of Justice is required pursuant to 42 U.S.C. § 1997f to report to Congress on CRIPA enforcement, make no mention of any difficulties with the statute. For its part, Congress has shown little interest in conducting oversight of the Justice Department's CRIPA activities since now-Governor Lowell Weicker left the United States Senate. As Chair of the Subcommittee on the Handicapped of the Senate Committee on Labor and Human Resources from 1980-1986, Senator Weicker conducted a series of hearings criticizing the Justice Department's role in enforcing CRIPA. *See* Rights of Institutionalized Disabled, *supra* note 3, at 612 n.2 & 615 n.46.

One indication of Congress' lack of interest in CRIP oversight is its apparent failure to notice that the Justice Department neglected to file its FY 1988 report, which presumably should have been submitted within a few months of September 30, 1988, the end of fiscal year 1988, until October, 1990. The FY 1989 Report was also submitted to Congress in October, 1990, a full year after the end of the fiscal year.

6. *See* Part one of this report for a more detailed discussion of the Lucas and Dunne appointments.

7. To the author of this chapter's knowledge, only two such cases have been filed since the twelve cases cited in Rights of

Institutionalized Disabled, *supra* note 3, at 620 n.107. One case, *United States v. New York*, No. CIV-88-138C (W.D.N.Y. filed February 5, 1988), concerns conditions at the Buffalo Psychiatric Center. The most recent CRIPA report, that for FY 1989, indicates that as of September 30, 1989, the case is still in a discovery phase, with the Justice Department and state officials conferring about a possible settlement of the suit. FY 1989 CRIPA Report at 27. *See United States v. New York*, 690 F. Supp. 1201 (W.D.N.Y. 1988) (refusing to review Attorney General's certificate in case).

Although information about consent decrees, which are typically unreported, is not always easy to come by, the Department also apparently filed a complaint and accompanying consent decree in October, 1989 concerning its investigation of the Los Lunas Hospital and Training School, a mental retardation facility in New Mexico. Telephone conversation with Peter Cubre, of the New Mexico Protection and Advocacy System, September, 1990. For a further discussion of the circumstances surrounding the Department's actions regarding this investigation, see the next section, *infra*.

In addition to the above substantive cases, the Department also filed suit in February 1988 against New York officials to provide access to Creedmoor Psychiatric Center so that the Department could conduct its CRIPA investigation. The suit was settled and dismissed after the parties agreed on a format for the Department's investigation. FY 1988 CRIPA Report at 6.

8. *See* FY 1988 CRIPA Report at 1 (mental health facility) and FY 1989 CRIPA Report at 2 (three new mental health investigations).

9. The two cases were *United States v. New Mexico*, No. 86-09-32M (D.N.M. filed August 8, 1986), concerning conditions at the Fort Stanton State Hospital, and *United States v. Oregon*, No. 86-961-LE (D. Or. filed July 28, 1986), concerning the Fairview Training Center. As noted in Rights of Institutionalized Disabled, *supra* note 3, at 620 n.107, the New Mexico case was on "inactive" status as of September 30, 1987, because of what the Department described as defendants' "concerted effort to improve conditions" at the facility. Subsequently, the Department narrowed its concerns in the case to medication practices only (in the meantime, private plaintiffs had brought suit against the Fort Stanton facility on conditions of confinement and community placement issues), and dismissed the case on December 12, 1988, because it found that such practices had improved significantly. FY 1989 CRIPA Report at 17. The Oregon case was settled by consent decree in April, 1989. FY 1989 CRIPA Report at 18. The Department has engaged in substantial efforts to enforce this decree. *See* discussion *infra*.

10. *See United States v. New York, supra* note 7. In its FY 1989 Report, however, the Department indicated that at the court's request it was negotiating with the state to eliminate the deficiencies found during discovery. FY 1989 CRIPA Report, at 27.

11. That is, the twelve case cited in Rights of Institutionalized Disabled, *supra* note 3, at 620 n.107, less the now-dismissed *United States v. New Mexico*.

12. *See* Rights of Institutionalized Disabled, *supra* note 3, at 401-05.

13. *United States v. Oregon*, Consent Decree, at 8, Par. III.B.16.

14. *Id.* at 9, Par. IV.A.

15. *Id.* at 19, Par. VII.A. *See also id.* at 24, Par. X.4 (termination of decree unless United States can show a provision of the plan not being implemented is essential to achievement of constitutional or statutory rights specifically recognized).

16. *Id.* at 24, Par. X.4. For an extensive criticism of these and other provisions of the consent decree, *see* Affidavit of Clarence J. Sundram, J.D., Attachment 1 to Plaintiff-Intervenors' Hearing Memorandum in *United States v. Oregon*, filed on or about April 4, 1989.

17. *Id.* at 3, Par. I.G. ("Further improvements in the quality of care to Fairview residents can be achieved by transferring significant numbers of residents to community-based residential programs.") The Consent Decree's plan of implementation further requires that the defendants develop procedures to assure that residents are regularly evaluated for the appropriateness of their institutional placement, *id.* at 15, Par. V.B.15, but as Clarence Sundram observes in his affidavit, *see supra* note 16 at 14, there is no requirement that residents for whom institutional placement is inappropriate actually be placed in appropriate community-based settings. Nor does the Consent Decree say anything about the nature of the community-based programs in which residents should be placed. *Id.* at 8.

The attorney for the plaintiff-intervenors in the case, representing the class of Fairview's residents, while generally complementary about the Department's tenacious efforts to enforce the Consent Decree, has noted that the Department has not pursued any compliance issues concerning community placement. Telephone conversation with Elam Lantz, Esq., August 13, 1990.

18. *United States v. Oregon*, Consent Decree, at 21, Par. VIII. (describes the role of the panel).

19. United States' Emergency Motion, filed June 8, 1990.

20. Report of the Advisory Panel, August 3, 1990, at 9.

21. *Id.* at 5-7.

22. Letter from Mary C. Cerreto, Ph.D., to Robert D. Dinerstein, dated January 7, 1991.

23. Over the years, at different junctures, private plaintiffs

and/or the United States attempted to persuade the court that defendants were in non-compliance with the 1978 decree. In 1983, the parties agreed to an amended consent decree that called for the closure of Forest Haven on September 30, 1988.

24. Order in *Evans v. Barry*, No. 76-293 (D.D.C. January 30, 1990) (holding defendants in contempt); telephone conversation with plaintiffs' attorney Joseph Tulman, August 1990.

25. FY 1989 CRIPA Report at 13.

26. *See, e.g.*, FY 1989 CRIPA Report, at 14 *(United States v. Colorado); id.*, at 22 *(United States v. Indiana)* (continuing compliance tours and discussions regarding Indiana mental hospitals that were the subject of the first CRIPA mental disability case, filed in 1984).

27. *See* Rights of Institutionalized Disabled, *supra* note 3, at 403-04. As of the end of fiscal year 1989, the Department appeared to be close to dismissing its second CRIPA mental disability case on the basis of compliance with the terms of the consent decree. *See* FY 1989 CRIPA Report at 15 (Department preparing stipulation of dismissal in *United States v. Louisiana*).

28. *United States v. Commonwealth of Massachusetts*, 890 F. 2d 507 (1st Cir. 1989).

29. The Worcester consent decree is discussed in Rights of Institutionalized Disabled, *supra* note 3, at 620, n.107, 621 nn.115 & 122, and 623 nn.146-54 and accompanying text.

30. *United States v. Massachusetts*, Settlement Agreement at 11, Section IV., especially 15, Par. IV. 14, and at 15, Section V; *United States v. Commonwealth of Massachusetts*, 890 F.2d at 508-09.

31. *United States v. Massachusetts, supra* note 30, at 510.

32. As noted in Rights of Institutionalized Disabled, *supra* note 3, at 621 n.122, the *Massachusetts* decree was in many respects *better* than those negotiated in other CRIPA cases, perhaps because it was entered only after the parties had already begun trial.

33. *See United States v. New York, supra* note 7, 690 F. Supp. at 1204-05 (describing Justice Department's proposed consent decree as "vague, open-ended, and unclear" regarding Department's authority and as "most difficult to administer" because general terms will inevitably lead to disputes that the court would be required to resolve).

34. Rights of Institutionalized Disabled, *supra* note 3, at 401-04.

35. FY 1987 CRIPA Report at 7; FY 1988 CRIPA Report at 5; FY 1989 CRIPA Report at 3.

36. FY 1987 CRIPA Report at 10; FY 1988 CRIPA Report at 11; FY 1989 CRIPA Report at 7. During this period, the Department apparently conducted two tours with a total of four experts, reviewed client medical and injury records, and reviewed documentation generated by Medicaid inspections. *Id.*

37. *See, e.g.*, Ellisville State School in Ellisville, Mississippi, FY 1987 CRIPA Report at 9, FY 1988 CRIPA Report at 9, & FY 1989 CRIPA Report at 6 (Department reported findings of unconstitutional conditions during fiscal year 1986; as early as 1987 report, the Department expected to file a consent decree, but as of the end of the 1989 fiscal year no consent decree had been filed); Embreesville Center in Coatesville, Pennsylvania, FY 1987 CRIPA Report at 9, FY 1988 CRIPA Report at 10, & FY 1989 CRIPA Report at 5 (delay in reporting of findings to state officials).

38. *See* Rights of Institutionalized Disabled, *supra* note 3, at 399-400 and 619 nn.84-90.

39. *See* FY 1988 CRIPA Report at 2; FY 1989 CRIPA Report at 20 ("The Department continues to monitor progress at these facilities and prepared letters describing our findings to the State as the year ended.").

40. *See* FY 1987 CRIPA Report at 8; FY 1988 CRIPA Report at 7; FY 1989 CRIPA Report at 4. According to these CRIPA reports, the Department sent its first letter of unconstitutional findings on July 28, 1986; followed up with another letter on December 2, 1986, after an expert tour of the facility; and spent the entire 1988 fiscal year unsuccessfully attempting to arrange additional expert tours, rebuffed by state officials who said the Fairview suit was taking up all their time. In its FY 1989 report, the Department indicated it had postponed further tours until March 1989 at the state's request. By the end of the fiscal year, the Department stated that it was reviewing a variety of issues in the litigation.

41. Telephone conversations with the two attorneys, September 1990. Because the Department of Justice typically does not disclose the sources of information for its CRIPA investigations, the author of this chapter has not identified them.

42. *See, e.g.*, FY 1988 CRIPA Report at 4 (investigation of Las Vegas Medical Facility in New Mexico terminated because of major improvements at the facility); FY 1988 CRIPA Report at 14, FY 1989 CRIPA Report at 10 (same, Montgomery Developmental Center, Ohio); FY 1988 CRIPA Report at 16, FY 1989 CRIPA Report, at 12 (same, Winfield State Hospital, Kansas).

43. Telephone conversation with Curtis Decker, Executive Director of the National Association of Protection and Advocacy Systems ("NAPAS"). Decker requested the meeting and led the delegation of NAPAS representatives that met with Dunne.

44. *Id.*

45. Telephone conversations with Elam Lantz, attorney for plaintiff-intervenors in *United States v. Oregon, supra* note 9, August 22, 1990, and Joseph Tulman, attorney for plaintiffs in *Evans v. Barry, supra* note 24, August, 1990. In both

cases, the attorneys indicated that the Department tended to focus on issues other than those related to community placement of institutionalized persons, which remains an issue that the Department has yet to re-examine significantly.

46. This paragraph is based on a telephone conversation with Peter Cubre, plaintiffs' attorney in the Los Lunas case, September 1990.

47. According to the plaintiffs' attorney, the private suit against Los Lunas is under submission to the district court judge. The judge also has the Department of Justice suit. *Id.*

Chapter XXIII

1. *See* N.Y. Times, March 21, 1989, at A24, col. 1.

2. The Reagan Administration had attempted to either dismantle the Commission or shift its agenda to the political right by appointing controversial members, drastically reducing funding, and leaving key staff positions (like the position of staff director) unfilled.

3. N.Y. Times, *supra* note 1

4. N.Y. Times, Mar. 23, 1989, at A18.

5. N.Y. Times, Oct. 8, 1989, at 31.

6. *Id.*

7. *Id.*

8. N.Y. Times, Oct. 7, 1989, at 6.

9. President's remarks at a White House Ceremony Commemorating the 25th Anniversary of the Civil Rights Movement, 25 Pres. Doc. 1013, 1014 (June 30, 1989).

10. 135 Cong. Rec. H8619 (daily ed. Nov. 14, 1989) (statement of Rep. Edwards)

11. *Id.*

12. *Id.*

13. 135 Cong. Rec. H8637 (daily ed. Nov. 15, 1989).

14. 135 Cong. Rec. S15920 (daily ed. Nov. 16, 1989).

15. 135 Cong. Rec. S14251 (daily ed. Oct. 26, 1989).

16. *Id.*

17. 135 Cong. Rec. S15920 (daily ed. Nov. 16, 1989).

18. 42 U.S.C. § 1975(d).

19. 41 U.S.C. § 1975f (1989).

20. 135 Cong. Rec. H8920 (daily ed. Nov. 17, 1989).

21. *Id.*

22. 135 Cong. Rec. S15920 (daily ed. Nov. 16, 1989).

23. 135 Cong. Rec. H8919 (daily ed. Nov. 17. 1989).

24. Biskupic, *Old Rights Commission Fight Seems Ready to Erupt Anew,* 42 Cong. Q. 3060 (1989).

25. *Id.*

26. *Id.*

28. N.Y. Times, Feb. 24, 1990, at A1.

29. *Id.*

30. *Id.*

31. Telephone interview conducted in June 1990.

32. Speech of Julius Chambers of the NAACP Legal Defense and Educational Fund at the University of North Carolina on May 13, 1989, *quoted* in Apple, *Tiptoeing, Bush Comes to a Fork on Civil Rights,* N.Y. Times, May 15, 1990, at A20.

33. Hook, *New Leaders Felt Their Way Gingerly Through Session,* 47 Cong. Q. 3284, 3307 (1989).

Chapter XXIV

1. Loessberg, Liss, & Yarashus, "The Judicial Nominations Process: Seeking a Commitment to Equal Justice," *One Nation, Indivisible: The Civil Rights Challenge for the 1990s* 76 (1989) [hereinafter cited as *One Nation, Indivisible*].

2. *Id.* In contrast, the Carter Administration's main goal was non-ideological, *i.e.*, to appoint more minorities and women to the bench. H. Schwartz, Packing the Courts 58 (1988). Consequently, some of President Carter's nominees were quite conservative. *Id.*

3. *One Nation, Indivisible, supra* note 1, at 76. The retreat from civil rights enforcement and equal justice is evident in recent Supreme Court decisions on affirmative action and employment discrimination. *See City of Richmond v. J.A. Croson Co.*, 109 S. Ct. 706 (1989); *Wards Cove Packing Co. v. Atonio*, 109 S. Ct. 2115 (1989).

4. Lewis, *Bush Travels Reagan's Course in Naming Judges,* N.Y. Times, April 10, 1990, at A1.

5. See "Judicial Nominees in the First Two Years of Bush Administration," People For The American Way Action Fund Report [hereinafter cited as "PFAW Report"], November 1, 1990. The report notes that Bush nominated 69 people for 70 vacancies: 1 to the Supreme Court; 19 to the courts of appeals; and 50 to the district courts. David Souter, Bush's sole Supreme Court nominee, had previously been nominated by Bush to the Court of Appeals.

6. Lewis, *supra* note 4.

7. PFAW reports that 26 of the 69 nominees, approximately 38%, were under 45 years of age.

8. U.S. Const. art. II, § 2, cl. 2.

9. *Id.*

10. *One Nation, Indivisible, supra* note 1, at 77.

11. 2 Nominations Network News, at 1 (Jan. 1990).

12. *One Nation, Indivisible, supra* note 1, at 78.

13. *Id.*

14. Lewis, *supra* note 4, at A1.

15. *Id.*

16. *Id.* at A19.

17. One Nation, *supra* note 1, at 78.

18. Lewis, *supra* note 4, at A19.

19. *Id.*

20. *Id.*

21. *Id.*

22. Lewis, *A.B.A. Under Fire for Role on Bench,* N.Y. Times, May 8, 1990.

23. *Id.*

24. *Id.*

25. Biskupic, *Justice Department and the ABA Settle Their Differences,* Cong. Q. 1327 (June 3, 1989).

26. *Id.*

27. *Id.*

28. *Id.*

29. Lewis, *supra* note 22.

30. *Id.*

31. *See generally,* Biskupic, *Bush Boosts Bench Strength of Conservative Judges,* Cong. Q. 171 (Jan. 19, 1991).

32. "A Report Card on the Bush Judges," Nominations Network News, Vol. 2, No. 3 (Dec. 1990).

33. Alliance for Justice, Judicial Selection Project, Year End Report, at 1, December 1990 [hereinafter cited as "Alliance Report"].

34. PFAW Report *supra* note 5.

35. 2 Nominations Network News, at 1 (Dec. 1990).

36. *Id.*

37. Lewis, *supra* note 4, at A1.

38. 2 Nominations Network News, *supra* note 32 at 1 (Dec. 1990).

39. Presidents Reagan and Carter each nominated two Asians. *See id.*

40. 2 Nominations Network News, *supra* note 32 at 11 (Dec. 1990).

41. *Id.*

42. Alliance Report, *supra* note 33, at 3 (Dec. 1990).

43. 2 Nominations Network News, *supra* note 32, at 1 (Dec. 1990).

44. *Id.*

45. Alliance Report, *supra* note 33, at 3 (Dec. 1990).

46. Kamen, *Liberal Justice Brennan Quits Supreme Court, Giving Bush Chance to Buttress Conservatives,* Wash. Post, Jul. 21, 1990, at A1.

47. Thomas, "The Bush Court," *Newsweek,* at 14 (July 30, 1990).

48. *Id.*

49. Devroy, *President Selects Souter, 50, For 'Intellect' and 'Ability'*, Wash. Post, Jul. 24, 1990, at A1.

50. *Id.*

51. Devroy, *In the End, Souter Fit Politically,* Wash. Post, Jul. 25, 1990, at A1.

52. *Id.* at A6.

53. *Id.* The four front-runners were David Souter, Edith H. Jones of the Fifth Circuit Court of Appeals, and Lawrence Silberman and Clarence Thomas of the D.C. Circuit Court of Appeals.

54. *Id.*

55. *Id.*

56. *Id.*

57. The groups opposing Souter included the Leadership Conference on Civil Rights, the NAACP, the Alliance for Justice, the Women's Legal Defense Fund, the National Women's Law Center, the National Organization for Women, the National Abortion Rights Action League.

58. *Liberal-Conservative Slugfest Looms Over a Bush Judicial Nominee,* Wash. Post, Feb. 20, 1991.

59. Report of People for the American Way on the Nomination of Kenneth Lee Ryskamp at 2.

60. *Id.*

61. See Albert, *Just Saying No to Rights,* Miami Rev., (Feb. 16, 1990) at 1 (referring to *Kerr v. City of West Palm Beach,* No. 85-8190 (S.D. Fla. June 1, 1987) (Order on Motions)).

62. *Id.*

63. *Kerr v. City of West Palm Beach,* 875 F.2d 1546 (11th Cir. 1989).

64. Albert, *supra* note 62, at 5 (referring to *Zaklama v. Mt. Sinai Medical Center of Miami Beach,* 842 F.2d 291, 296 (11th Cir. 1988)).

65. Albert, *supra* note 62 at 4 (referring to *Tullis v. Lear Schools, Inc.,* 874 F.2d 1489 (11th Cir. 1989)).

66. Hatch, *Clarence Thomas Once Again Will Overcome*, Wall St. J., Feb. 5, 1990.

67. McAllister, *EEOC Chief Faces Scrutiny as Court Nominee*, Wash. Post, Feb 5, 1990.

68. *Id.*

69. *The Next Lynching*, Wall St. J., Jan. 17, 1990.

70. Marcus, *Stalled Judicial Nomination Advances*, Wash. Post, Nov. 17, 1989.

71. *Id.*

72. *Id.*

73. *Id.*

74. Nominations Network News, *supra* note 11, at 2.

75. Gomperts, *Senators Ponder Politics of Social Life*, Legal Times, at 25 (June 4, 1990).

76. Model Code of Judicial Conduct Canon 2 Commentary, 1984.

77. Staff of Senate Comm. on the Judiciary, 101st Cong., 2d Sess., Committee Resolution.

78. *One Nation, Indivisible*, *supra* note 1, at 76.

Chapter XXV

1. National Gay and Lesbian Task Force, "Anti-Gay Violence, Victimization & Defamation in 1988," at 6.

2. *Va. Students Confront Prejudice*, Wash. Post, Dec. 5, 1988.

3. *Hate Crimes Increase and Become More Violent; U.S. Prosecutors Focus on 'Skinhead' Movement*, Wall St. J., Jul. 14, 1989.

4. *Cross Burnings Terrify, Bewilder Hmong*, The Sacramento Bee, Feb. 3, 198

5. *Skinheads Linked to 'Gay Bashing' Sprees in Rochester*, Wash. Times, May 18, 1989.

6. *Neo-Nazi Activity Is Arising Among U.S. Youth*, N.Y. Times, Jun. 13, 1988.

7. *Loo Coalition Pleased with Meeting with Willoughby*, News, Carey, North Carolina, Sept. 10, 1989.

8. Birch Bayh, *Let's Tear Off Their Hoods*, (former Senator and chairman of the National Institute Against Prejudice and Violence) *Newsweek*, Apr. 17, 1989.

9. Richard Foltin, *Hate Crimes America's Youth — Whether Poor or Privileged — as Today's Perpetrators*, *AJC Journal*, Autumn 1989, at 9-10.

10. Pub. L. No. 101-275

11. The ADL has written extensively on hate crimes, including: *Hate Crimes, Policies and Procedures for Law Enforcement Agencies; Hate Groups in America, A Record of Bigotry and Violence;* and *Skinheads Target The Schools.*

12. Hearings before the Senate Subcommittee on the Constitution, Jun. 21, 1988, at 3 (testimony of Col. Leonard Supenski, Crime Prevention Bureau Chief of the Baltimore County Police Department) Col. Supenski also testified on behalf of the Police Executive Research Forum.

13. *New Effort Developing Against Hate Crimes*, N.Y. Times, May 12, 1989.

14. Connecticut, Florida, Idaho, Illinois, New York, Massachusetts, Minnesota, Oklahoma, Oregon, Pennsylvania, Rhode Island and Virginia. In addition, Pennsylvania, Illinois, Minnesota and Oregon mandate training for law enforcement personnel in identifying, responding to, and reporting hate crimes. Anti-Defamation League of B'nai B'rith, "1990 Audit of Anti-Semitic Incidents," at 19.

15. The Uniform Crime Reporting program (UCR) is a voluntary, nationwide crime data collection mechanism. It is a joint project of the International Association of Chiefs of Police and the National Sheriff's Association, administered by the FBI 16,000 law enforcement agencies in the United States report crimes data through the UCR.

16. Testimony of Representative Kennelly before the House Subcommittee on Criminal Justice, March 21, 1985, at 4.

17. *Id.*

18. The Department of Justice has responsibility for prosecuting violations of federal criminal statutes directed at racially or religiously motivated violence by private individuals. See 18 U.S.C. § 241, 18 U.S.C. § 245, and 42 U.S.C. § 3631.

19. Testimony of William M. Baker, Assistant Director of the FBI, Office of Congressional and Public Affairs before the Subcommittee on Criminal Justice, March 21, 1985, at 7.

20. House Judiciary Committee Report 100-575 on H.R. Doc. No. 3193, the Hate Crime Statistics Act, at 3 citing *Lack of Figures on Racial Strife Fueling Dispute — Justice Department and Rights Groups Do Not Agree*, N.Y. Times, Apr.4, 1987.

21. House Judiciary Committee report 100-575 on H.R. Doc. No. 3193, the Hate Crime Statistics Act, at 3 citing *U.S. Rights Official Discounts Tension: Reynolds Says Racial Attacks Have Not Been Increasing*, N.Y. Times, Feb. 2, 1987.

22. Letter to House Judiciary Chairman, Peter Rodino, received on Dec. 17, 1987, at 3.

23. Senate Judiciary Committee Report 101-21 on S. Doc. No. 419, the Hate Crime Statistics Act, at 4.

24. House Criminal Justice Subcommittee Hearing Record serial no. 132, on anti-gay violence, on Oct. 9, 1986.

25. Abt Associates Inc, "The Response of the Criminal Justice System to Bias Crime: An Exploratory Review" Oct. 7, 1987, at 2. Contract No. OJP-86-002.

26. Representative Dannemeyer "Dear Colleague" letter, June 26, 1989.

27. In the 100th Congress, the House Judiciary Committee defeated the Dannemeyer amendment to strike "sexual orientation" from the legislation, 11-22, on October 10, 1987 and in the 101st Congress, it was defeated, 1-33, on June 20, 1989.

28. Senate Hearing record 100-1069, serial no. J-100-79, on June 21, 1988, on S. 702, S. 797 and S. 2000.

29. Hearings before the Senate Subcommittee on the Constitution, Jun. 21, 1988, at appendix B (testimony of Murray Friedman).

30. Testimony submitted by Leonard D. Goodstein, Ph.D., executive vice president and chief executive officer, on behalf of the American Psychological Association, at 4.

31. *Blocking the Way*, Baltimore Jewish Times, Nov. 10, 1989. stating, "The time has come for the Senate to stand up to its number one obstructionist, Jesse Helms, and pass the hate crimes statistics act."

32. Press release by the Police Executive Research Forum on the introduction of the Hate Crime Statistics Act in the 101st Congress on February 22, 1989.

33. Letter from Attorney General Tierney to Senator Simon, July 13, 1989. The National Association of Attorney General concluded that "the efforts of the Attorneys General would be assisted by a hate crimes statistics act which would provide for the collection and publication by the U.S. Department of Justice of information on the frequency and nature of hate-based and bias-related crimes." Tierney also organized a letter of support for the Hate Crime Statistics Act in the 100th Congress, signed by 30 state attorneys general.

34. Letter to Senate Judiciary Chairman Joseph Biden from Thomas Boyd, Assistant Attorney General, Office of Legislative Affairs of March 8, 1989: "In view of the importance that the Department places on the elimination of crimes motivated by racial and other forms of hatred, we support the objectives of S. 419 and do not oppose the bill's enactment. Attorney General Thornburgh spoke at a Department of Justice ceremony honoring Dr. Martin Luther King Jr. on January 8, 1990 and said: "Our continuing course will be to investigate, indict and punish those who unleash their bigotry and intolerance in cowardly acts of anonymous vandalism, open abuse, or conspiratorial violence. We will also seek passage of the Hate Crimes Statistics Act, now before Congress, so that we can gain a better grip on the full dimensions of the rampant violence attending hate crimes." On the 25th anniversary of the 1964 civil rights movement, President Bush remarked, "We added our voice to those calling for passage of the Hate Crimes [Statistics] Act." Press release of June 30, 1989.

35. Wash. Post, Feb. 1, 1990.

36. Along the coalition's efforts, People For the American Way Action Fund waged a print advertisement blitz calling Senator Helms "soft on crime" because he refused to allow the Senate to deal with the hate crimes issue. The ads ran in North Carolina's *Charlotte Observer* and the *Greensboro News and Record* on October 16, 1989, and in Washington D.C.'s *Roll Call* on October 23, 1989 and *The Washington Blade* on November 10, 1989. The People For the American Way press release said: "Jesse Helms is a destructive force in the United States Senate. His vision of America is a narrow one, defined more by hate and prejudice than by an effort to help those in our society in need. Our ad campaign is intended to expose Helms for the threat that he is."

37. The Senator from North Carolina offered amendment numbered 1251:

It is the sense of the Senate that —

(1) the homosexual movement threatens the strength and survival of the American family as the basic unit of society;

(2) State sodomy laws should be enforced because they are in the best interest of public health;

(3) the Federal Government should not provide discrimination protections on the basis of sexual orientation; and

(4) school curriculums (sic) should not condone homosexuality as an acceptable lifestyle in American society. Cong. Rec., Feb. 8, 1990, at S1083.

38. *Helms' Defeat Staged Behind the Scenes*, The Washington Blade, Feb. 16, 1990. The Helms amendment was defeated, 19-77.

39. *Sununu Said To Be Urging Bush to Calm Upset Right*, Wash. Times, May 7, 1990; *Bush Apparent Mellowing on Gay Issues Irks GOP*, The Washington Blade, May 11, 1990.

40. Rowland Evans and Robert Novak, *Bush and The Gay Lobby*, Wash. Post, May 25, 1990.

41. Letter to Mrs. Paulette Goodman, May 10, 1990.

42. *Bush Link to Right is Fired*, Washington Times, Aug. 2, 1990.

43. Fed. Reg., Jul. 12, 1990, at 28610.

44. The FBI discussed the implementation of the Hate Crime Statistics Act at a National Hate Crime Conference in Alexandria, Virginia, August 28-29, 1990, at the Association of State Uniform Crime Reporting Programs in Mobile, Alabama, September 10-14, 1990 and at the International Chiefs of Police Association meeting in Tulsa, Oklahoma, October 6-11, 1990.

45. "Training Guide for Hate Crime Data Collection" (draft 12/3/90) by Anthony J. Pinozzotto, Ph. D., UCR program staff.

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WORKING PAPERS:

THE CIVIL RIGHTS ACT OF 1990

Chapter IV:
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EDUCATION

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IMMIGRATION

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National Origin and Citizenship Discrimination Caused by IRCA's Employer Sanctions: A Comparison of Remedies

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HEALTH

Chapter XI:

Important Developments in the Civil Rights Impact of National Health Policies

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HOUSING

Chapter XIII:
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Chapter XIV:
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AFFIRMATIVE ACTION

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The New Legal Regime: Affirmative Action After *Croson* and *Metro*

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POLITICAL RIGHTS

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RIGHTS OF INSTITUTIONALIZED PERSONS

Chapter XIX:
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RIGHTS OF PERSONS WITH DISABILITIES

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U. S. CIVIL RIGHTS COMMISSION

Chapter XXIII:
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